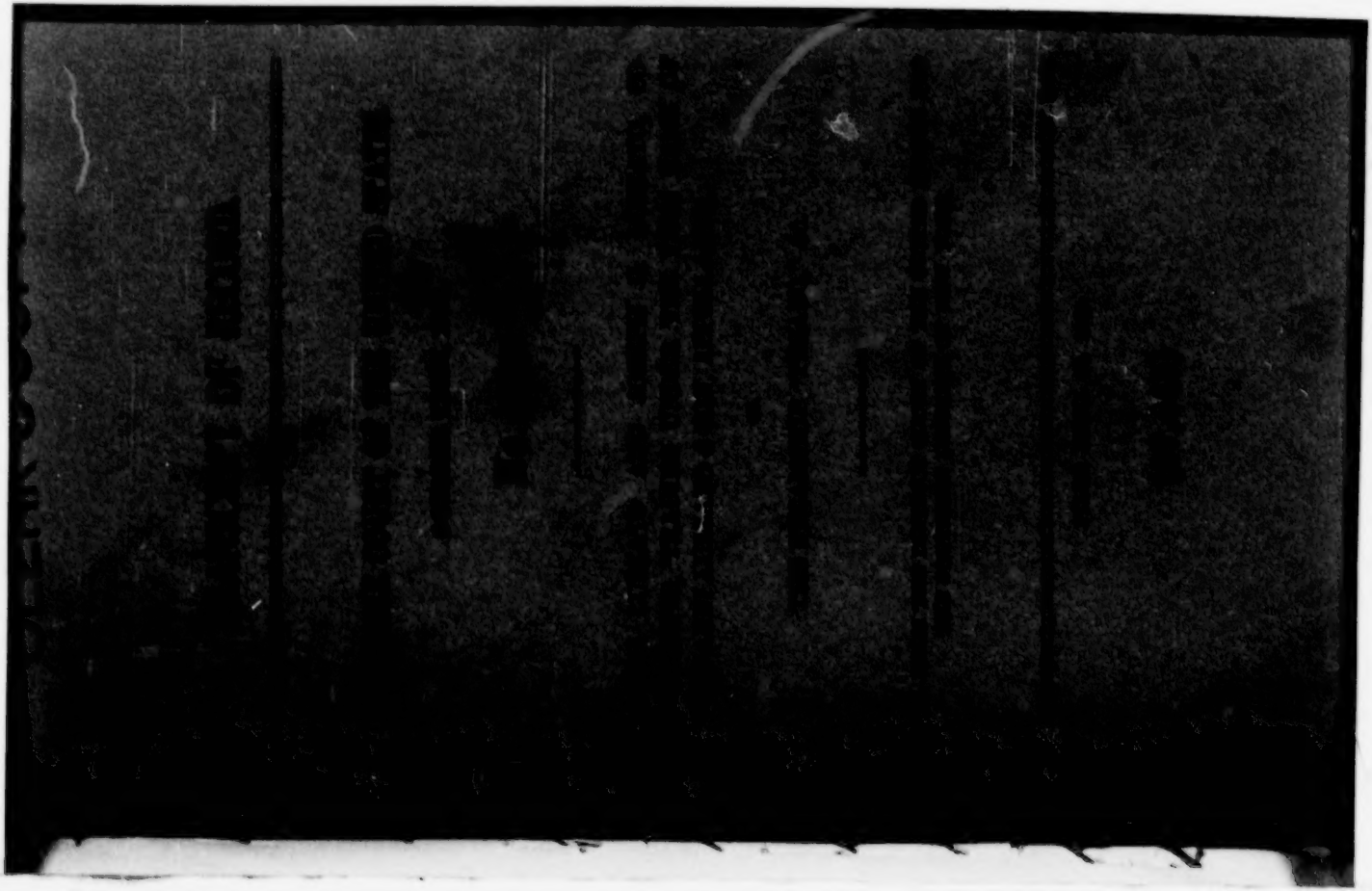


(27,645)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 890.

GIOVANNI LUZZATO AND JOSEPH G. LUZZATO, CO-PARTNERS, TRADING UNDER THE FIRM NAME OF GIOVANNI LUZZATO & SON, APPELLANTS,

vs.

THE STEAMSHIP "PESARO," &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 24, 1920.

1 *Libel.*

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Libel and Complaint of GIOVANNI LUZZATO and JOSEPH G. Luzzato, co-partners, trading under the firm name of Giovanni Luzzato & Son,

against

THE STEAMSHIP "PESARO," HER ENGINES, BOILERS, etc., in a cause of contract and cargo damage, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

First. That at all the times hereinafter mentioned the Libellants, Giovanni Luzzato and Joseph G. Luzzato, were and still are co-partners trading under the firm name of Giovanni Luzzato & Son, with an office and place of business at No. 25 Beaver Street, in the Borough of Manhattan, City, County and State of New York.

Second. That at all the times hereinafter mentioned the said S. S. "Pesaro" was a general ship engaged in the common carriage of merchandise by water, for hire, between the ports of Genoa, Italy and New York, in the State of New York.

Third. That the S. S. "Pesaro" is now or will be during the pendency of process hereunder within this District and within the jurisdiction of this Honorable Court.

2 Fourth. That on or about the 30th day of August, 1919, Succ. Francesco Cassini shipped and placed on board the said S. S. "Pesaro", then lying at the port of Genoa, 290 cases of olive oil in tins, in good order and condition, to be carried on the said S. S. "Pesaro" to the port of New York and there to be delivered in like good order and condition as when shipped to the order of Banca Commerciale Italiana, in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading then and there signed and delivered to the shippers by the duly authorized agent of said S. S. "Pesaro."

Fifth. That thereafter, the said S. S. "Pesaro" with the said merchandise on board, sailed from the said port of Genoa, and on or about the 17th day of September, 1919, arrived at the port of New York and made delivery of the said shipment, but not in like good order and condition as when shipped but slack, short, seriously injured and damaged.

Sixth. Prior to the arrival of the said S. S. "Pesaro" at the port of New York, as aforesaid, the Banca Commerciale Italiana, through its agency in New York, endorsed said bill of lading to the order of

the Lincoln Trust Company of New York, and thereafter the said Lincoln Trust Company endorsed said bill of lading and delivered the same to your Libellants, who then became and still remain the lawful owners and holders thereof and of the said shipment of 290 cases of olive oil in tins, and was and is entitled to the delivery thereof, in accordance with the agreement above set forth.

3 Seventh. By reason of the premises your libellant has sustained damage in the sum of Forty-eight hundred ($4,800) Dollars, as nearly as the same can now be estimated, no part of which has been paid, although the same has been duly demanded.

Eighth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction issue against the said steamship "Pesaro", her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this Honorable Court be pleased to decree to your libellant its damages with interest and costs and that the steamship "Pesaro", her engines, etc., be condemned and sold to satisfy the same and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant,
Office and P. O. Address,
64 Wall Street, New York City.

4 STATE OF NEW YORK,
County of New York, ss:

Giovanni Luzzato, being duly sworn, depoes and says:
That he is one of the partners of Giovanni Luzzato & Son, the libellants herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

GIOVANNI LUZZATO.

Sworn to before me this 16 day of December, 1919.

GEORGE W. NICHOLS,
[SEAL.] *Notary Public, Suffolk County.*

Certificate filed in N. Y. Co. #1.

5 [Endorsed:] 71-179. United States District Court Southern District of New York. Giovanni Luzzato & Joseph G. Luzzato, co-partners, trading under the firm name of Giovanni Luzzato & Son, libellant, against Steamship "Pesaro", her engines, boilers, etc. (Copy.) Libel. Harrington, Bigham & Englar, Proctors

for Libellant, 64 Wall Street, New York City. Filed January 5. 1920.

6 *Monition.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

[SEAL.] The President of the United States of America to the Marshal of the Southern District of New York, Greeting:

Whereas, a Libel hath been filed in the District Court of the United States for the Southern District of New York, on the 5th day of January in the year of our Lord one thousand nine hundred and twenty by Giovanni Luzzato, et al., vs. Steamship "Pesaro" her engines &c. in a cause, civil and maritime, for cargo damage $4,800— for the reasons and causes in the said libel mentioned, and praying the usual process or monition of the said Court in that behalf to be made, and that all persons interested in the said steamship or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said steamship or vessel, her tackle, &c., may for the causes in the said petition mentioned be condemned and sold to pay the demands of the Libellant.

You are therefore hereby commanded to attach the said steamship or vessel, her tackle, &c., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the 26th day of January, 1920, at 10.30 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Hon. Learned Hand, Judge of the said Court, at The City of New York, in the Southern District of New York, this 10th day of January in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fourth.

ALEX GILCHRIST, JR.,
Clerk.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

7 In obedience to the within Monition I attached the Steamship "Pesaro" her engines &c. therein described, on the 10th day of January, 1920, and have given due notice as appears by proof of publication hereto annexed to all persons claiming the same, that this Court will on the 26th day of January 1920 inst. (if that day shall be a day of jurisdiction ,if not, on the next day of Jurisdiction

thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

THOMAS D. McCARTHY,
U. S. Marshal.

Dated January 26th, 1920.

I hereby certify that on the 20th day of January, 1920, by consent of the Proctors for the libellant the St'ship "Pesaro" her engines &c. was discharged from my custody.

THOMAS D. McCARTHY,
U. S. Marshal, S. D., N. Y.

Dated N. Y., Jan'y 26/'20.

[Endorsed:] Vol. 71, page 179. United States District Court, Southern Dist. of New York. Giovanni Luzzato et al., vs. Steamship "Pesaro" her engines &c. Monition ret'able January 26, 1920. Harrington, Bigham & Englar, Proctors for Libellant. Filed Jan. 26, 1920.

8 *Affidavit of Publication.*

STATE OF NEW YORK,
City and County of New York, ss:

Edgar Gallagher, being duly sworn, says that he is the Principal Clerk of the Publisher of "The Evening Post", a daily newspaper printed and published in the City and County of New York; that the notice hereto annexed has been regularly published in the said "The Evening Post" commencing on the 19th day of January, 1920.

The rate charged and paid for the publication of such notice in the annexed bill is not in excess of the commercial rate to private individuals.

EDGAR GALLAGHER.

Sworn to before me this 19th day of January, 1920.

[SEAL.] JAMES W. JENNINGS,
Notary Public, New York County.

Commission expires March 30, 1921.

[Endorsed:] Filed Jan. 26, 1920.

9 *Notice.*

United States District Court, Southern District of New York.

GIOVANNI LUZZATTO et al.

versus

STEAMSHIP "PESARO," HER ENGINES, etc.

Notice.

I have arrested the foregoing vessel upon a libel filed in a cause civil and maritime for cargo damage $4,800. Process returnable and cause heard on opening of said court on Jan. 26, 1920, at U. S. Court House and Post Office Building, Manhattan, New York City. All persons interested must appear or default and condemnation will be ordered.

Dated, New York, Jan. 19, 1920.

THOMAS D. McCARTHY,
U. S. Marshal, S. D. of N. Y.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

[Endorsed:] Filed Jan. 26, 1920.

10 *Copy.*

No. 7208.

Suggestion, with Certificate of Secretary of State.

UNITED STATES OF AMERICA,
Department of State:

To all to whom these presents shall come, Greeting:

I Certify that Baron Camillo Romano Avezzana whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Envoy Extraordinary and Minister Plenipotentiary of Italy.

In testimony whereof I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department at the City of Washington, this 16th day of January, 1920.

ROBERT LANSING,
Secretary of State,

[SEAL.] By BEN. G. DAVIS,
Chief Clerk.

11 (Copy.)

Regia Ambasciata D'Italia.

Baron Camillo Romano Avezzana, Ambassador of the Kingdom of Italy to the United States of America, through Kirlin, Woolsey & Hickox, proctors appearing specially for the Italian steamship Pesaro, for the purpose of claiming immunity and for no other purpose, respectfully suggests to the District Court of the United States for the Southern District of New York, that said Steamship Pesaro at all the times mentioned in the libel and complaint of Giovanni Luzzato and Joseph G. Luzzato, co-partners doing business under the firm name and style of Giovanni Luzzato & Son, against the Steamship Pesaro was, since has been, and now is, owned by the Government of the Kingdom of Italy, and is now in the possession of the Government of the Kingdom of Italy, in the person of a Master employed and paid by said Government, and is wholly manned and operated by a master, officers, engineers and crew employed and paid by said Government.

Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from the process of this Court.

Done at the Embassy of the Kingdom of Italy.

Washington, D. C., January fifteenth, 1920.

[SEAL.] ROMANO AVEZZANA.

[Endorsed:] Filed Jan. 20, 1920.

12 *Memorandum Order Vacating Attachment.*

Upon the suggestion of the Italian Ambassador filed herein to the effect that the S. S. Pesaro is owned by the Italian Government and now in its possession and manned by a crew of said Government, I vacate the attachment herein, conceiving myself so bound to do under the authority of the Carlo Poma decided by the Circuit Court of Appeals for this Circuit.

JNO. C. KNOX,
U. S. D. J.

Jan. 20, 1920.

[Endorsed:] Filed Jan. 20, 1920.

13 United States District Court, Southern District of New York.

Petition.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-Partners, Trading under the Firm Name of GIOVANNI, LUZZATO & SON, Libellants,

against

S. S. "PESARO," Her Engines, Boilers, etc.

Your petitioners, the libellants herein, by Harrington, Bigham & Englar, their proctors, respectfully represent that the above action was instituted in this court by your petitioners by the filing of a libel with the Clerk of this court on January 5, 1920; that by said action your petitioners seek to recover damages in the sum of Four Thousand, Eight Hundred ($4,800.00) Dollars, to certain merchandise shipped and placed on board the said steamship "Pesaro" at the port of Genoa in good c[illegible]ition on or about the 30th day of August, 1919, and delivered by said ship at the port of New York on or about the 17th day of September, 1919, but not in like good order and condition as when shipped, but slack, short, seriously injured and damaged; that said goods were shipped under a certain bill of lading issued by Lloyd Sabaudo, which your petitioners believe to be
14 a joint stock company, limited by shares, having its principal office and place of business at Genoa; authorized capital 30,000,000 Italian Lires; issued and paid in capital 20,000,000 Italian Lires, general management Genoa, via Sottoripa No. 5; principal agencies, Naples and Palermo, which is set forth in the said bill of lading, a copy of which is attached hereto and marked Petitioners' Exhibit "1"; that said S. S. "Pesaro" is engaged in regular liner service between ports of Italy and New York as a general ship engaged in the common carriage of merchandise.

Your petitioners further respectfully represent that the said S. S. "Pesaro" has been arrested by the United States Marshal for the Southern District of New York, pursuant to process issued in accordance with the prayer of said petitioners' libel, that thereafter Baron Camillo Romano Avezzano, Ambassador of the Kingdom of Italy to the United States of America, has filed with this Court a suggestion through Messrs. Kirlin, Woolsey & Hickox, appearing specially for this purpose only, which suggestion sets forth that the said S. S. "Pesaro" "was, since, has been and now is, owned by the Government of the Kingdom of Italy, and is now in the possession of the Government of the Kingdom of Italy, in the person of a master, employed and engaged by said Government, and is wholly manned and operated by a master, officers, engineers and crew employed and paid by said Government."

15 Your petitioners further respectfully represent, although they have no knowledge or information sufficient to form a definite belief, that said S. S. "Pesaro" may be operated and managed for account of said Lloyd Sabaudo or may be manned and op-

erated by a master, officers, engineers and crew, constructively employed and paid by said Government, but in fact directly employed and paid by Lloyd Sabaudo, which is a private steamship company, and that, although said Italian Government may in the last analysis allow credit in accounting to said Lloyd Sabaudo for the compensation of said officers and crew, said officers and crew may, in fact, be employees of said Lloyd Sabaudo, and further that although the S. S. "Pesaro" may be constructively in the possession of the Government of the Kingdom of Italy, nevertheless the said S. S. "Pesaro" may, since have been and may be now in the actual possession of Lloyd Sabaudo, for account of the Government of the Kingdom of Italy; in other words your petitioners respectfully represent that said S. S. "Pesaro" may be operated and managed as a commercial carrier for hire just as are the ships of the United States of America, being operated as common carriers for hire by private American steamship companies as agents. As indicative of the basis of your petitioners' representations, they submit the attached affidavit which is marked Petitioners' Exhibit "No. 2."

16 Your petitioners further respectfully represent that the indelicacy of questioning a suggestion by the Ambassador of a foreign government is imposed on your petitioners by virtue of the direct suggestion of said Ambassador to this Court, rather than through a suggestion verified as to fact by the State Department of the United States, that if the latter course were pursued your petitioners could raise an issue of fact before said Department of State or before this Court on such suggestion of the Department of State of the United States without any undue discourtesy to the dignity of a foreign sovereign but that the direct suggestion of said foreign Ambassador precludes your petitioners from such action and your petitioners hereby respectfully object to the admissibility of a direct suggestion by the Italian Ambassador.

Your petitioners further respectfully represent that, without in any way impugning the integrity of the said Ambassador of the Kingdom of Italy to the United States of America, or the conclusions set forth by said Ambassador in the above suggestion, that said statements of the said Ambassador as conclusions may to his mind and his conception of the legal significance of the word "possession" be correct, but that the facts on which said conclusions are reached and the issue whether or not said S. S. "Pesaro" is actually in the "possession of the Government of the Kingdom of Italy, in the person of a master employed and paid by the said Government of the

17 Kingdom of Italy," and also whether or not the said S. S. "Pesaro" is "wholly manned and operated by a master, officers, engineers and crew employed and paid by said government," should be more fully before this court before the prayer of the said Ambassador of the Kingdom of Italy for immunity from process in this court can be properly determined, and therefore your petitioners respectfully deny that they have any knowledge or information sufficient to form a definite belief as to the allegations contained in said suggestion and respectfully ask for proof of same.

Wherefore your petitioners respectfully suggest and pray that this

Honorable Court may permit the traverse of the conclusions in said suggestion contained, so that the facts may be more fully produced before this Court before said ship be declared immune from the process of this Court, and respectfully suggest and pray that this Court may require the presentation of a suggestion containing a more specific statement of facts, an examination of the captain and crew of said S. S. "Pesaro" and other parties to determine said facts in detail, and further pray that this Honorable Court may sustain your petitioners' objection to the acceptance of the above direct suggestion, and your petitioners further pray that they may have such other and further relief as in law and justice they may be entitled to receive.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioners.

No. 64 Wall Street, New York City.

18 STATE OF NEW YORK,
County of New York, ss:

Henry J. Bigham, being duly sworn, deposes and says:
That he is a member of the firm of Harrington, Bigham & Englar, proctors for the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

HENRY J. BIGHAM.

Sworn to before me this 21st day of January, 1920.
[SEAL.] FRANCIS B. MULRY,
Notary Public.

New York County Clerk's No. 463.
New York County Register No. 152.
Commission expires March 30, 1921.

19 PETITIONER LIBELLANT'S EXHIBIT #1.

LLOYD SABAUDO

Joint Stock Company limited by Shares.

Having its principal place of business at Genoa.
Authorized capital: 30,000,000 Italian Lires.
Issued and paid in capital: 20,000,000 Italian Lires.
General Management: Genoa, Via Sottoripa No. 5.
Principal Agencies: Naples and Palermo.

Bill of Lading #16.

Genoa, August 30th, 1919.

Received by Succ. Francesco Cassini, to be loaded on the steamer "Pesaro" Master —— —— or one of the three subsequent steamers bound for New York, and to be delivered upon their safe arrival to Banca Commerciale Italiana, or to their order the following goods

marked and numbered as herein set forth, upon the terms appearing on the back of this Bill of Lading.

General Agents for the United States and Canada, Furness Withy & Co., Ltd., 32 Broadway, New York.

The freight was paid at Geonoa, as per statement.

Marks.	Numbers.	Number of packages.	Destination of contents.
GL-s	12	120	
	24	60	
	48	80	Cases of Olive Oil
	96	20	
	192	10	
		290	

20 By the acceptance of this Bill of Lading, the shipper or any other party interested in the goods carried explicitly, declares to accept all the clauses, terms and exceptions contained both on the face and on the back of this Bill of Lading, whether printed or written.

There have been issued two duplicates of this Bill of Lading duly signed, one of which having been discharged, the other becomes ineffective.

THE MASTER,
By —— ——.

Freight prepaid.
Copy for the Master.

21 PETITIONER-LIBELLANT'S EXHIBIT #2.

GIOVANNI LUZZATO & SON, Libellant,

against

S. S. "PESARO."

COUNTY OF NEW YORK,
State of New York, ss:

Charles Hann, Jr., being duly sworn, deposes and says:

I am, inter alia, an attorney and counsellor at law and associated with the firm of Messrs. Harrington, Bigham and Englar, 64 Wall Street, New York City, having formerly been a lieutenant commander in the United States Naval Reserve, and now on inactive duty.

About 11 a. m. o'clock, on January 20th, 1920, I, solely in a civilian capacity, went aboard the S. S. "Pesaro" then lying on the south side of Pier 94, North River. I observed that the crew were civilian sailermen, and as far as clothing was concerned, were dressed similarly to crews aboard other privately owned mercantile steam-

ships. Some of the men wore caps with visors, but there was no insignia or device on these hats.

I spoke to about ten men. Some of them could not speak English. The others, in answer to my questions, told me that the S. S. "Pesaro" was not managed or operated by the Italian government. I was informed that I should go to Lloyd Sabando, Whitehall Street, to obtain passage on the ships for Genoa; and that the voyage would take twenty-one days. Blue barrels, containing oil, I believe, were
22 being swung aboard, three at a time during my stay aboard the "Pesaro."

On the pier, I addressed a special patrol officer, an assistant superintendent and several men. They all said that the S. S. "Pesaro" was not an Italian government ship, that the crew was not a government crew, and the officers were not government officers.

One man suggested that she was about to be sold to the English; another thought an Italian Navigation Company owned her; and two others said that Lloyd Sabando owned or chartered her. They felt certain that the Italian government did not operate the ship.

Leaving the pier about 12 noon, I stopped and talked to some men outside the saloon across the street from the pier. Their views were the same as expressed above herein.

Meanwhile the captain of the S. S. "Pesaro" passed us with a friend going east on 53d Street. He was pointed out to me as the captain of the "Pesaro" and I was asked why I did not seek my information from him. Being assured by another group that the man designated was the Captain of the "Pesaro," I ran and caught up to the two men and asked, "Are you the captain of the "Pesaro?" The companion of the captain said, "He is the captain." I then asked if the captain was in the Italian Nacy now or during the war, and I was told that he was not, but was a "marina." I inquired if that was the same as our merchant marine officer, and was assured that it was. Furthermore, they told me that the "Pesaro" was not an Italian government or navy ship.

Both men were dressed in ordinary business suits and overcoats.

CHARLES HANN, JR.

Sworn to before me this 21st day of January, 1920.
[SEAL.] FRANCIS B. MULRY,
Notary Public.

New York County Clerk's No. 463.
New York County Register No. 1521.

Commission Expires March 30, 1921.

23 [Endorsed:] United States District Court, Southern District of New York. 71-179. Giovanni Luzzato and Joseph G. Luzzato, co-partners, trading under the firm name of Giovanni Luzzato & Son, Libellants, against The Steamship "Pesaro," her engines, boilers, etc. (Copy.) Petition. Filed Jan. 21, 1920. Harrington, Bigham & Englar, Proctors for Petitioners, 64 Wall Street, New York City.

Take notice that the within is a copy of a Petition duly filed this day in the within entitled action in the Office of the Clerk of the United States District Court for the Southern District of New York.

Dated, New York, January 21, 1920.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner, 64 Wall Street,
New York City.

24 At a Stated Term of the District Court of the United States, Held in and for the Southern District of New York, at the United States Court House and Post-Office Building, in the Borough of Manhattan, City of New York, on the 23rd Day of January, 1920.

Present: Honorable John C. Knox, United States District Judge.

GIOVANNI LUZZATO & JOSEPH G. LUZZATO, Co-partners, Trading under the Firm Name of Giovanni Luzzato & Son, Libellant-,

against

STEAMSHIP "PESARO," HER ENGINES, BOILERS, etc.

Order.

It appearing that a libel was filed herein on the 5th day of January, 1920, praying that process issue against the steamship Pesaro, her engines, boilers, etc., and said process having issued to the Marshal for the Southern District of New York, and the said Marshal having arrested said steamship, and Kirlin, Woolsey & Hickox, appearing specially on behalf of the Royal Italian Ambassador for the steamship Pesaro, having moved this Court for an order dismissing the libel herein and releasing said steamship from the seizure
25 made as aforesaid, and declaring said steamship immune from the process of this Court.

Now, on reading and filing the process and the suggestion of the Royal Ambassador of the Kingdom of Italy, the official status of said Ambassador being authenticated and viséed by the Secretary of State of the United States, whereby it appears that the said steamship Pesaro at all the times mentioned in the libel was and now is owned by the government of the Kingdom of Italy, and in the possession of the government of the Kingdom of Italy, commanded and wholly manned by a master and crew employed and paid by the said government, and after hearing William H. McGrann, Esq., and Randolph Harris, Esq., of Kirlin, Woolsey & Hickox, Proctors, appearing specially as aforesaid in support of said motion, and Oscar R. Houston, Esq., and Harold Amberg, Esq., of Harrington, Bigham & Englar, Proctors for the libellant, in opposition thereto, and having overruled the libellant's objection to the admissibility of a suggestion by the Italian Ambassador direct to this Court, and having denied the libellants the right to raise an issue of fact by way of a traverse of the representations contained in said suggestion, and having granted

leave to libellants over the objection of the counsel appearing specially for the Italian Ambassador to file a petition hereunder, setting forth the above motions, and the prayer in said petition contained being denied and due deliberation having been had thereon, and being of the opinion that said steamship Pesaro is not subject to arrest under process of this Court, for the reason that said
26 steamship Pesaro is represented to be the public property and in possession of the government of the Kingdom of Italy, such representation being contained in the aforesaid suggestion made by the Ambassador of His Majesty, the King of Italy, to the United States, and having denied the motion of the libellants that any order of immunity from arrest entered herein be conditioned on an undertaking presently entered into, on behalf of the parties at interest, should at any time in the future, said S. S. Pesaro be held subject to arrest herein, said motion being denied because there is no present party in interest who can be *re-* required to enter into such an undertaking.

Now, on motion of Kirlin, Woolsey & Hickox, proctors appearing specially on behalf of the Royal Italian Ambassador for the steamship Pesaro, as aforesaid, it is

Ordered, that said Steamship Pesaro be, and the same hereby is released from any seizure and declared immune from the process of this Court so long as said Steamship Pesaro is under the ownership and possession of the Government of the Kingdom of Italy, as set forth in the suggestion of the Ambassador of the Kingdom of Italy to the United States of America, filed with this Court on the twentieth day of January, 1920.

JNO. C. KNOX,
U. S. D. J.

January 23, 1920.

[Endorsed:] Filed Jan. 23, 1920.

27 *Memorandum Opinion of Court.*

Endorsed on Order Made Herein on Jan. 23, 1920.

I consider that the relief prayed for in the petition of the libellant should be denied upon the ground that I hold the allegations therein or facts which may be offered in support thereof are not admissible to contravert or question the veracity of the suggestion of the Italian Ambassador.

JNO. C. KNOX, *D. J.*

[Endorsed:] Filed Jan. 23, 1920.

28 United States District Court, Southern District of New York.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-partners, Trading under the Firm Name of GIOVANNI LUZZATO & SON, Libellants,

against

STEAMSHIP "PESARO," HER ENGINES, BOILERS, etc.

Notice of Appeal.

SIRS:

Please take notice that the libellants herein appeal to the Supreme Court of the United States from the Final Decree of this Court, entered on the 23rd day of January, 1920, in the office of the Clerk of this Court and from each and every part of said Final Decree.

Dated, New York, March 15th, 1920.

Yours, etc.,

HARRINGTON, BIGHAM AND ENGLAR,
Proctors for Libellants,

Office and Post Office Address, No. 64 Wall Street, New York City.

To Messrs. Kirlin Woolsey, Campbell, Hickox & Keating, appearing specially for Italian Ambassador to the United States, 27 William Street, New York City.

Alexander Gilchrist, Esq., Clerk of the United States District Court, Post Office Building, New York City.

29 [Endorsed:] United States District Court, Southern District of New York. Giovanni Luzzato and Joseph G. Luzzato, co-partners, trading under the firm name of Giovanni Luzzato & Son, Libellants, against Steamship "Pesaro," her engones, boilers, etc. (Copy.) Notice of Appeal. Harrington, Bigham & Englar, Proctors for Libellants, 64 Wall Street, New York City. Filed Mar. 15, 1920.

30 United States District Court, Southern District of New York.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-partners, Trading under the Firm Name of GIOVANNI LUZZATO & SON, Libellants,

against

STEAMSHIP "PESARO," Her Engines, Boilers, etc.

Assignment of Errors.

Now come Giovanni Luzzato and Joseph G. Luzzato, the libellant-appellants, by Harrington, Bigham & Englar, their proctors, and having appealed from the Final Decree of the District Court of the United States for the Southern District of New York, entered in said Court on the 23rd day of January, 1920, whereby the Steamship

"Pesaro" was released from seizure and declared immune from the process of this Court, to the Supreme Court of the United States, in the above entitled cause of contract and cargo damage, civil and maritime, assigns the following as the errors on which they intend to rely on said appeal:

The District Court of the United States for the Southern District of New York erred:

1. In that it held that it had no jurisdiction to subject the S/S "Pesaro" to its process in this suit.

31 2. In that it found and ordered that the arrest of the said S/S "Pesaro" under execution of process herein should be vacated.

3. In that it held that because the said S/S "Pesaro" was represented to be the public property and in the possession of the government of the Kingdom of Italy, the arrest under execution of process herein, should be vacated.

4. In that it held that, because the S/S "Pesaro" was represented to be the public property of and in the possession of the government of the Kingdom of Italy, this Court should not and could not take jurisdiction.

5. In that it denied its jurisdiction in the absence of any representation to the District Court by the Government of the United States or any department thereof that the said ship was the property of and in the possession of the Kingdom of Italy.

6. In that it denied its jurisdiction in the absence of proper proof, adduced before the said District Court, that the said ship was the property and in the possession of the Kingdom of Italy.

7. In that it held that the suggestion of the Italian Ambassador was, as to facts therein alleged and stated, conclusive on the District Court and not traversable.

8. In that it held that a suggestion by the Italian Ambassador, authenticated by the State Department of the United States only as to the official status of said Italian Ambassador, was sufficient and that the representations of fact contained in said suggestion were binding on said Court and were not subject to question as to the correctness of the conclusions therein as to the ownership and the possession of the Kingdom of Italy.

32 9. In that in spite of the fact that said steamship was carrying a cargo of merchandise for and belonging to private individuals, some of whom were residents and citizens of the United States of America on bills of lading issued by Lloyd Sabaudo, the agents of said steamship (it nowhere appearing that Lloyd Sabaudo was other than a private steamship company, as indicated by said bill of lading) to be carried for an agreed freight, payable to the said Lloyd Sabaudo, the District Court held that the said steamship

was not subject to arrest in an admiralty proceeding in rem for damage to the said merchandise covered by said bills of lading, on the ground that said steamship was represented by a suggestion of the Ambassador of the Kingdom of Italy to the United States, to be the property and in the possession of the Kingdom of Italy.

10. In that it failed to hold that the said steamship was carrying merchandise as a common carrier for hire and that it was subject to the jurisdiction of the Courts of the United States, particularly with respect to claims of its residents or citizens arising out of said merchandise so carried, and that therefore said process of arrest should not have been vacated.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellants.

Office and Post Office Address, No. 64 Wall Street, New York City.

[Endorsed:] Filed Mar. 30, 1920.

33 United States District Court, Southern District of New York.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-Partners, Trading under the Firm Name of GIOVANNI LUZZATO & SON, Libellants,

against

STEAMSHIP "PESARO," Her Engines, Boilers, etc.

Notice.

SIRS:

Please take notice that the within is a copy of a petition and order, certificate and citation which will be presented to Honorable John C. Knox, at Court Room #3 in the Woolworth Building, New York City, at 2 P. M., on the 2nd day of April, 1920.

Dated, New York, March 31, 1920.

Yours, etc.,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellants.

Office and Post Office Address, No. 64 Wall Street, New York City.

To Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street, New York City.

[Endorsed:] Filed Apr. 6, 1920.

34 United States District Court, Southern District of New York.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-Partners, Trading under the Firm Name of GIOVANNI LUZZATO & SON, Libellants,

against

STEAMSHIP "PESARO," Her Engines, Boilers, etc.

Petition for Allowance of Appeal and Order of Allowance.

The above named libellants, Giovanni Luzzato and Joseph G. Luzzato, conceiving themselves aggrieved by the Final Decree entered herein on the twenty-third day of January, 1920, whereby the S/S "Pesaro" was released from seizure and declared immune from the process of this Court, and having filed with the Clerk of said District Court an assignment of errors, do hereby appeal from said final decree to the Supreme Court of the United States, for the reasons specified in said assignment of errors and they pray that this, their appeal, may be allowed and that the question of the jurisdiction of the above entitled District Court to entertain jurisdiction of said S/S "Pesaro" under said libel and to award the relief therein sought, be certified to the Supreme Court of the United States and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court
35 of the United States.

Dated, New York, April 3, 1920.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellants.

Office and Post Office Address, No. 64 Wall Street, New York City.

And now to wit: on April 3, 1920, it is ordered that the appeal be allowed as prayed for.

JNO. C. KNOX,
U. S. D. J.

[Endorsed:] Filed April 6, 1920.

36 United States District Court, Southern District of New York.

Certificate as to Question of Jurisdiction.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-Partners, Trading Under the Firm Name of GIOVANNI LUZZATO & SON, Libellants,

against

STEAMSHIP "PESARO," Her Engines, Boilers, Etc.

I, John C. Knox, Judge of the United States District Court for the Southern District of New York, do hereby certify that the S/S

"Pesaro" arrested by the United States Marshal for the Southern District of New York, under execution of process as prayed in the libel herein of Giovanni Luzzato and Joseph G. Luzzato, co-partners, trading under the firm name of Giovanni Luzzato & Son, against the S/S "Pesaro," her engines, boilers, etc., was by me released from said arrest and declared immune from arrest hereunder, for the reason that Baron Camillo Romano Avezzano, Ambassador of the Government of the Kingdom of Italy to the United States of America, appeared specially herein and filed a suggestion with this Court, from which suggestion it appeared that the S/S "Pesaro" was then an Italian vessel owned and in the possession of the Government of the Kingdom of Italy, wholly manned by a master and crew employed and paid by the said government, and that the said libel and bearing came on regularly to be heard before me and that counsel for the said Italian Ambassador, Baron Camillo Romano
37 Avezzano, did urge that the United States District Court, sitting as a Court of Admiralty, had no jurisdiction over the S/S "Pesaro" because the vessel was the property and in the possession of a foreign government.

I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a Court of Admiralty, has no jurisdiction to subject to its process a steamship, which is by the suggestion of the said Italian Ambassador filed in this Court represented to be the public property and in the possession of the Kingdom of Italy. Copies of the libel, the suggestion of the Italian Ambassador, Camillo Romano Avezzano, the petition of the libellants, and the decree of the District Judge are hereto attached and made a part of this certificate. This certificate is made in conformity with Section 238 of the Act entitled "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," approved, March 3rd, 1911, Chapter 231, as amended.

Dated, New York, April 3, 1920.

JOHN C. KNOX,
U. S. D. J.

[Endorsed:] Filed April 6, 1920.

38 United States District Court, Southern District of New York.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Co-partners, Trading Under the Firm Name of Giovanni Luzzato & Son, Libellants.

against

STEAMSHIP "PESARO," HER ENGINES, BOILERS, ETC.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To the S/S "Pesaro," her engines, boilers, etc., to Baron Camillo Romano Avezzano, Ambassador of the Kingdom of Italy, to the

United States of America, appearing voluntarily and specially herein as representative of the claimant of said S/S "Pesaro," the Kingdom of Italy, and to Messrs. Kirlin, Woolsey, Campbell, Hickox and Keating, proctors appearing specially for said Ambassador.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 3rd day of May, 1920, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, for the Southern District of New York, wherein Giovanni Luzzato and Joseph G. Luzzato are appellants, and Baron Camillo Romano Avezzano, as representative of the Kingdom of Italy, appearing voluntarily and specially herein, is claimant-appellee, to show cause, if there be any, why the decree so appealed from should not be corrected and reversed and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 3rd day of April, the year of our Lord, One thousand nine hundred and twenty and of the independence of the United States, 144th.

JNO. C. KNOX,
U. S. D. J.

[Endorsed:] Filed April 8, 1920.

(Endorsed.)

Copy received Kirlin, Woolsey, Campbell, Hickox & Keating, April 7th, 1920.
[Endorsed:] Filed April 8, 1920.

United States District Court, Southern District of New York.

GIOVANNI LUZZATTO and JOSEPH G. LUZZATTO, Co-partners Trading Under the Firm Name of Giovanni Luzzatto & Sons, Libelants,

against

STEAMSHIP PESARO.

Notice of Motion.

SIRS:

Please take notice that on the suggestion of the Royal Italian Ambassador, dated January 15, 1920, and upon all the papers filed and proceedings had herein, a motion will be made at a Stated Term of the District Court of the United States, to be held in and for the Southern District of New York, at the United States Court House Post Office Building, in the Borough of Manhattan, City of New York, on the 23rd day of April, 1920, at 10:30 o'clock on the morning of said day, or as soon thereafter as counsel may be heard, for an order striking out from the record herein the so-called petition

of the libelants herein, verified by Henry J. Bigham on January 21, 1920, together with the exhibits annexed thereto, as well as the affidavit of Charles Hann, Jr., verified the 21st day of Jan-
42 uary, 1920, and for such other and further relief as may be just.

Dated, New York, April 16, 1920.

Yours, etc.,

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for the Italian Steamship Pesaro, appearing specially for the purpose of claiming immunity and for no other purpose.

Office and Post Office Address, 27 William Street, Borough of Manhattan, City of New York.

To Messrs. Harrington, Bigham & Englar, Proctors for Libellants, 64 Wall Street, New York City.

43 [Endorsed:] Giovanni Luzzato, et eno., Libellants, against S. S. Pesaro. Notice of Motion. Filed April 26, 1920. Kirlin, Woolsey, Campbell, Hickox & Keating, 27 William Street, New York.

44 United States District Court, Southern District of New York.

71—179.

GIOVANNI LUZZATTO and JOSEPH G. LUZZATTO, Co-partners, Trading under the Firm Name of GIOVANNI LUZZATTO & SONS, Libellants,

against

STEAMSHIP PESARO.

Note of Issue for Motion.

Motion for order striking out certain documents from proposed record on appeal.

Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for steamship Pesaro, for the motion.
Harrington, Bigham & Englar, proctors for libellants, in opposition.

Motion noticed for April 23, 1920.
Notice filed by Kirlin, Woolsey, Campbell, Hickox & Keating.

[Endorsed:]: Filed April 20, 1920.

45 *Memorandum Opinion of April 24, 1920, Re Denial of Motion to Strike Petition from Record.*

Over the protest of the libellant- I vacated the attachment and arrest originally issued herein. At the time of the hearing there was urged upon me as a reason for refusing to act as I did, the state of facts presented by the petition filed herein upon January 21, 1920. This petition formally presenting what was before me somewhat more informally I am asked to strike from the record.

My action in releasing the Pesaro from arrest is now under review, and I am unable to see why the reviewing authority should not be apprised of all the facts that appeared before me and which were considered in reaching my conclusion. Only by so doing, it seems to me, can the nature and extent of error, if any, be properly seen and corrected. The motion to strike out the petition is denied.

April 24, 1920.

JNO. C. KNOX.

[Endorsed:] Filed Apr. 26, 1920.

46 United States District Court, Southern District of New York.

#A. 71-179.

GIOVANNI LUZZATTO and JOSEPH LUZZATTO, Co-partners, Trading under the Firm Name of GIOVANNI LUZZATTO & SON, Libellant-,

vs.

THE STEAMSHIP "PESARO," etc.

Stipulation on Appeal Record.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, April 13, 1920.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for the Italian Steamship Pesaro, Appearing Specially for the Purpose of Objecting to the Jurisdiction of the Court, and for No Other Purpose.

47 [Endorsed:] United States District Court, Southern District of New York. Giovanni Luzzatto & Joseph Luzzatto, Etc. Libellant-, vs. S. S. "Pesaro," Etc. Stipulation as to Correctness of Appeal Record. Harrington, Bigham & Englar, Proctors for Libellant-, No. 64 Wall Street, Borough of Manhattan, City of New York.

48 UNITED STATES OF AMERICA,
Southern District of New York, ss:

71-179.

GIOVANNI LUZZATTO and JOSEPH G. LUZZATTO, Co-partners, Trading under the Firm Name of GIOVANNI LUZZATTO & SON, Libellant-,

vs.

THE STEAMSHIP "PESARO," etc.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of April, in the year of our Lord one thousand nine hundred and Twenty, and of the Independence of the said United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of New York.]

ALEX. GILCHRIST, JR.,
Clerk.

49 [Endorsed:] United States District Court, Southern District of New York. Giovanni Luzzatto, and Joseph G. Luzzatto, copartners, trading under the firm name of Giovanni Luzzatto & Son, Libellants, against Steamship "Pesaro," her engines, boilers, etc. Original transcript of record on appeal. Harrington, Bigham & Englar, Proctors for Libellants, 64 Wall Street, New York City.

Endorsed on cover: File No. 27,645. S. New York D. C. U. S. Term No. 890. Giovanni Luzzatto and Joseph G. Luzzatto, copartners, trading under the firm name of Giovanni Luzzatto & Son, appellants, vs. The Steamship "Pesaro," &c. Filed April 30th, 1920. File No. 27,645.

Supreme Court of the United States,

OCTOBER TERM—1920.

No. 167

GIUSEPPE CAVALLARO,

Petitioner,

—against—

Steamship "CARLO POMA," etc.
KINGDOM OF ITALY,

Claimant.

No. 317

GIOVANNI LUZZATO and another,

Appellants,

—against—

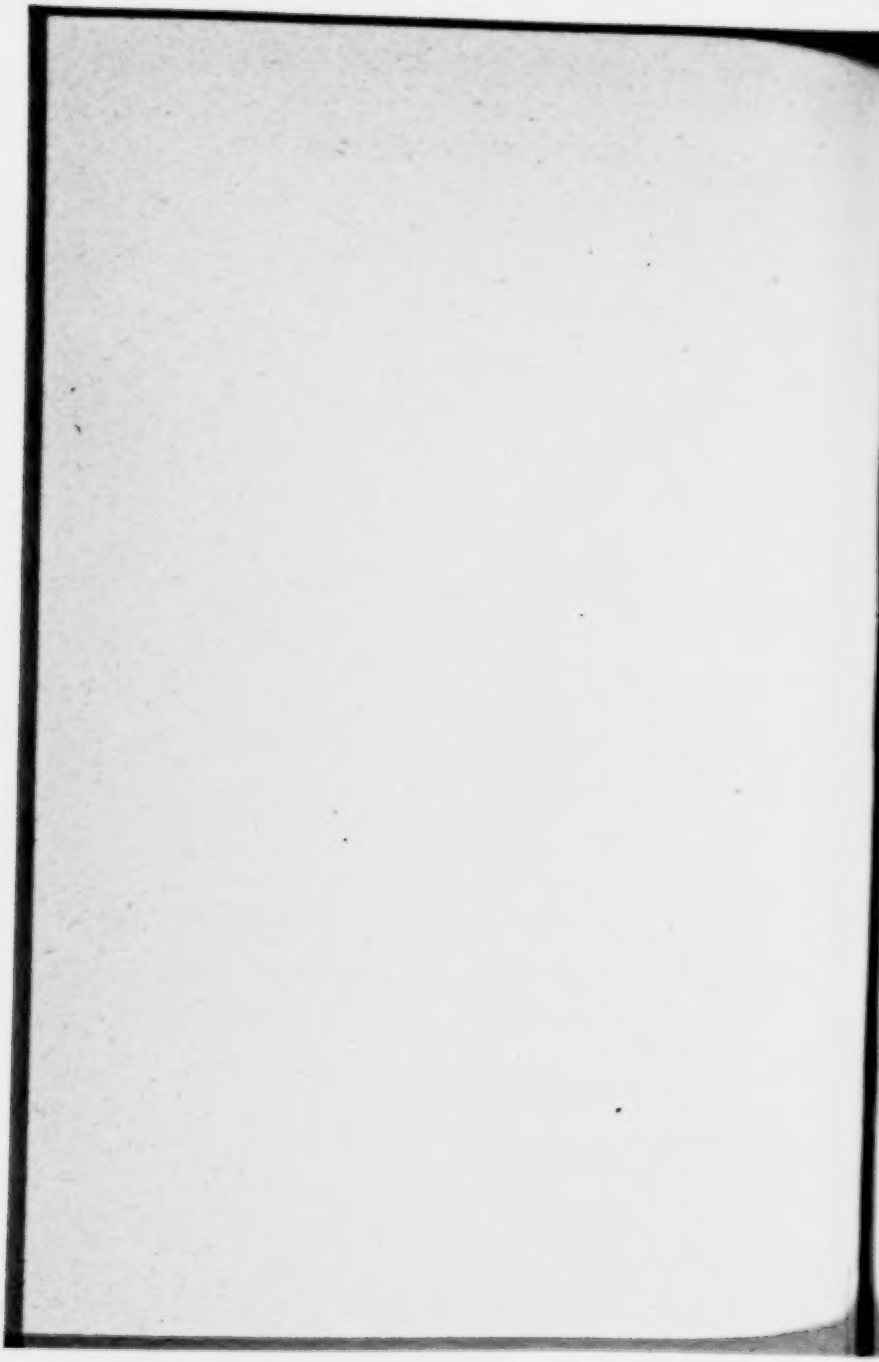
The Steamship "PESARO," etc.
KINGDOM OF ITALY,

Claimant.

BRIEF FOR THE PETITIONER AND APPELLANTS.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner and Appellants.
64 Wall Street,
New York City.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
HAROLD V. AMBERG,
of Counsel.



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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1920.

No. 167

GIUSEPPE CAVALLARO,

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—against—

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KINGDOM OF ITALY,

Claimant.

No. 317

GIOVANNI LUZZATO and another,

Appellants,

—against—

The Steamship "PESARO," etc.
KINGDOM OF ITALY,

Claimant.

BRIEF FOR THE PETITIONER AND APPELLANTS.

These two cases, and the case of the S. S. "Baron Ogilvy" (No. 555) were directed to be heard together because they present similar questions as to the extent of the immunity of merchant ships of foreign governments.

FACTS OF THE "CARLO POMA."

The petitioners filed a libel *in rem* against the S. S. "Carlo Poma," alleging that

1. The vessel was a general ship engaged in the common carriage by water of merchandise for hire between various ports (p. 1).

2. A shipment of 10,712 boxes of lemons was shipped in good order on the "Carlo Poma" at Messina, for carriage to New York and that bills of lading were duly issued covering the shipment.

3. The cargo, when discharged and delivered to the petitioner at New York, was seriously damaged because of poor stowage, etc.

4. The petitioner was the owner of the shipment and his loss through the damage to the lemons during their carriage amounted to $60,000 (p. 2).

The libel is the ordinary libel *in rem* to recover for damage to cargo.

Process was issued against the vessel in usual course and the U. S. Marshal took possession of her.

Thereupon counsel appeared specially for the Royal Italian Ambassador and moved for an order staying the execution of process and in support of the motion filed the following suggestion (pp. 3-4):

"ROYAL ITALIAN EMBASSY

Count V. Macchi Di Cellere, Ambassador of the Kingdom of Italy to the United States of America, through Burlingham, Veeder, Masten & Fearey, proctors appearing specially for the Italian Steamship "Carlo Poma," respectfully sug-

gests to the District Court of the United States for the District of New York, that said steamship "Carlo Poma" at all the times mentioned in the libel was, and now is, owned by the Government of the Kingdom of Italy, being registered in the name of the Italian State Railways, a branch of said Government, and in the possession of the Government of the Kingdom of Italy, in the person of a master employed and paid by said Government, and wholly manned and operated by a crew employed and paid by said Government, which said steamship is to transport back to Italy a cargo belonging to the Government of the Kingdom of Italy.

Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from process.

Done at the Embassy of the Kingdom of Italy, Washington, D. C., September , 1918.

MACCHI DI CELLERE.

(Seal Italian Embassy)."

"Suggestion No. 753

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I certify that Count V. Macchi Di Cellere, whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Ambassador Extraordinary and Plenipotentiary from the Kingdom of Italy.

In testimony whereof, I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my

name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 26th day of September, 1918.

ROBERT LANSING,
Secretary of State.

By BEN G. DAVIS,
Chief Clerk.

(Seal)

For the contents of the annexed document the Department assumes no responsibility."

A hearing was then had after which the following order was entered, which really summarizes the whole matter:

"It appearing that a libel was filed herein on September 27th, 1918, praying that process issue against the steamship "Carlo Poma," her engines, boilers, etc., and that said process having issued to the Marshal for the Southern District of New York, and Burlingham, Veeder, Masten & Fearey, appearing specially on behalf of the Royal Italian Ambassador for the steamship "Carlo Poma," having moved this Court for an order staying the execution of said process,

Now, on reading and filing the process and the suggestions of the Royal Ambassador and High Commissioner of the Kingdom of Italy, authenticated and vised by the Secretary of State of the United States whereby it appears that the said steamship "Carlo Poma" at all the times mentioned in the libel, was and now is owned by the Government of the Kingdom of Italy, registered in the name of the Italian State Railways, a branch of said Government, and in the possession of said Government, commanded and manned by a master and crew employed and paid by the said Government, and about to transport back to Italy a cargo belonging to said Government, and after hearing William P. Allen, Esq., of Burlingham,

Veeder, Masten & Fearey, proctors appearing specially as aforesaid in support of said motion and D. Roger Englar, Esq., of Harrington, Bigham & Englar, proctors for libellant in opposition thereto, and due deliberation having been had thereon, and being of the opinion that this Court should not and will not take jurisdiction herein for the reason that said steamship "Carlo Poma" is represented to be public property of the Government of the Kingdom of Italy and in public use, such suggestion being made by the Ambassador of H. M. the King of Italy to the United States and not herein denied.

Now, on motion of Burlingham, Veeder, Masten & Fearey, proctors appearing specially on behalf of the Royal Italian Ambassador for the steamship "Carlo Poma" as aforesaid, it is

Ordered, that execution of said process of attachment be, and the same hereby is stayed.

Enter,

CHAS. M. HOUGH,
U. S. C. J."

An appeal was taken and the order was affirmed. The opinion of the Circuit Court of Appeals appears at page 8 of the record and is reported in 259 Fed. Rep. 369.

A writ of certiorari was granted by this Court on October 24, 1919.

FACTS OF THE "PESARO."

A libel was filed by the appellants, substantially similar in form to the libel in the "Carlo Poma," to recover for damages to a shipment of 290 cases of olive oil shipped at Genoa to New York.

A suggestion was filed by counsel for the Italian Ambassador practically identical in wording with that filed in the case of the "Carlo Poma," except that, in the

"Pesaro" suggestion, there is no allegation that the "Pesaro" was carrying Government cargo (Record, p. 6).

On the argument before the District Court, leave was granted to the libellants to file a formal petition, setting forth certain points then argued and motions then made, and this petition was filed January 21, 1920 (p. 7). In this petition the libellants urged particularly that the suggestion should come from the Executive Department of the United States, that the statement of the Italian Ambassador as to "possession" was a conclusion of law and fact; that the libellants should be allowed to put the fact of "possession" in issue by way of a traverse, and further the libellants set forth, by way of exhibits, a certain affidavit and a copy of the bill of lading, on which the libellants based their belief that the S. S. "Pesaro" was not in the possession of the Italian Government.

The District Judge formally disposed of the arguments and motions in said petition in the settlement of the order entered January 23rd, 1920 (p. 12). This order vacated the attachment (p. 13) and in a memorandum opinion (p. 13) the Court said that the facts stated in the suggestion of the Italian Ambassador could not be controverted. A subsequent motion by counsel, appearing specially for the Italian Ambassador, to strike the petition from the record, was, on April 24th, 1916, denied by the District Court (p. 21).

From the order declaring the vessel immune, an appeal was taken to this Court on the ground that the jurisdiction of the District Court was in issue and a certificate to that effect was given by the District Judge (p. 17).

Arrangement of This Brief.

There are two distinct questions involved in these cases; *first*, the question to what extent immunity should

be granted to the merchant ships of foreign sovereigns, and, *second*, the right of a foreign ambassador to claim such immunity by a direct application to our courts, and the right of private litigants to traverse the suggestion of the ambassador. These two questions will be dealt with as Parts I and II of this Brief.

PART I.

Immunity.

POINT I.

The question of the immunity of a merchant ship of a foreign sovereign is of novel impression in this Court.

The only case involving the immunity of a ship of a foreign sovereign heretofore decided by this Court is

The Exchange, 7 Cranch. 116 (1811).

The schooner "Exchange" originally belonged to the libellants but was captured by the French, condemned by the French Prize Court and converted into a French vessel of war. Upon her entering an American harbor thereafter, the libellants filed a libel to procure a decree restoring her to them.

A suggestion was filed by the United States Attorney, at the instance of the executive department of the United States Government, setting up that the vessel was a vessel of war belonging to a friendly sovereign and praying for her release from process. A denial of the suggestion was filed by the libellants and supporting affidavits were filed by the United States Attorney.

The District Court dismissed the libel, the Circuit Court reversed the judgment and the United States Attorney appealed to this Court.

The opinion of the Court is by Marshall, C. J. He says:

> "This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States? The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated. In exploring an unbeaten path, with few, if any, aids from precedents or written law, the Court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.
>
> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other,

and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

He then says there are three cases in which every sovereign state is understood to waive a part of its complete

territorial jurisdiction, and to regard as immune while in its territory:

1. The person of a foreign sovereign.

2. The ministers of foreign sovereigns.

3. The troops of foreign sovereigns permitted to pass through its territory.

He concludes that the same reasons applied in favor of foreign vessels of war.

As to the *extent* of the immunity he says:

> "* * * all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act."

The *Exchange*, it is to be noted, is to be distinguished from the present cases in two important particulars:

1. The *Exchange* was a vessel of war, a unit of the navy of France.

2. Her release was demanded by the Executive Department of the United States.

Since the "Exchange," the doctrine of sovereign immunity has been considered in a number of cases that have a bearing more or less directly upon the present cases. The more important of them are as follows:

1. It has been held that our courts may take jurisdiction of a prize taken or harbored in our territorial waters in violation of our neutrality.

The Santissima Trinidad, 7 Wheat 283, 335 (1822).

Holds that prizes captured by warships outfitted in violation of our neutrality may be restored to their rightful owners in a suit *in rem*. Mr. Justice Story, delivering the opinion of the court, said:

> "An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction, by the universal assent of nations; and that as all property captured by such ships, is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.
>
> In the case of *The Exchange* (7 Cranch 116), the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn, upon notice, at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws, in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoys a personal

immunity, he may become liable to judicial process, in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity, of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there, any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain, within another territory, it may be, that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may, therefore, be justly laid down, as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his courts: and that the exceptions to this rule are such only as, by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion, that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and

> if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws."

The same result was reached in the recent case of

The Appam, 243 U. S. 124.

2. It has been held that property of the United States is not immune from process if actual physical possession of it is not held by an officer of United States.

The Davis, 10 Wall. 15 (1869).

An agent of the U. S. Treasury shipped cotton, the property of the United States, on the "Davis," a privately owned schooner. The "Davis" suffered a disaster and the libellants performed salvage services, bringing her and her cargo safely to port, and then libelled both hull and cargo, before the cotton was delivered into the actual possession of any officer of the United States. *Held* (1) a salvage lien attached to the cargo and (2) the lien might be enforced by a libel filed against the cotton provided a seizure under the libel could be made without taking the property out of the actual possession of the government, exercised by a government officer.

3. It has been held that if the United States is the moving party in a litigation, third parties may assert claims to property even in the possession of officers of the United States.

The Siren, 7 Wall. 152 (1868).

A confederate vessel was captured and while on her way to the port of adjudication in charge of a prize

master and crew, came into collision with the sloop "Harper." The owners of the sloop "Harper" intervened in the prize court proceedings and were allowed to recover their damages out of the proceeds of the "Siren" on the theory that the United States, by instituting proceedings to condemn the vessel as prize, submitted to the jurisdiction so far as to allow a presentation of set-offs. The case contains a full review of the prior cases in which private parties were allowed to enforce liens on property owned by and in the possession of the Government.

4. It has been held that even vessels owned by the United States and in the possession of its officers become subject to maritime liens, just as privately owned vessels do; the only distinction is that there may be no court with jurisdiction to enforce the lien if the sovereign is a necessary party to the suit.

Briggs v. *The Light Boats,* 11 Allen 157 (Mass. 1865).

The petitioners had performed labor and furnished materials in the construction of three light ships. After the vessels were turned over to the United States Government and put in charge of the Light House Board, the petitioners sought to enforce mechanics' liens given by the statutes of Massachusetts. *Held* the vessels were not subject to the Court's jurisdiction. The opinion contains a very interesting historical review of the remedies of an individual against the sovereign.

Workman v. *New York City,* 179 U. S. 552 (1900).

Held that a libel *in personam* would lie against the City of New York to recover for a maritime tort com-

mitted by a fire boat while engaged in fighting a fire. The Court said:

> "We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that Court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that, as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given."

5. It has been decided that suit may be brought against officers of the United States to try title to land held by such officers on behalf of the United States.

United States v. *Lee*, 106 U. S. 196 (1882).

This was a suit in ejectment by certain individuals against two officers of the United States who were in charge of Arlington, the national cemetery. Title in the United States was set up by the defendants, and a suggestion of title in the United States was also presented by the United States Attorney. The Court proceeded to try the title on the merits and awarded the property to the plaintiffs (p. 207), saying:

> "On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this Court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."
> * * *

"Another class of cases in the English courts, in which attempts have been made to subject the public ships and other property of foreign and independent nations found within English territory to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange* v. *McFaddon*, 7 Cranch 116; *Luther* v. *Borden*, 7 How. 1; *State of Georgia* v. *Stanton*, 6 Wall. 50." *

* * *

"This examination of the cases in this Court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the Court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the Court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly

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* *Luther* v. *Borden*, 7 How. 1, holds that the question which of two constitutions adopted by rival conventions in the State of Rhode Island, is valid, is a political question to be decided by the State of Rhode Island.

Georgia v. *Stanton*, 6 Wall. 50, holds that the Supreme Court will not enjoin the enforcement of the Reconstruction Acts on the theory that they are subversive of the sovereignty of a state, as this is a political question.

disposed of the case. And we see no escape from the conclusion that during all this period the Court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson, Brown* v. *Huger,* and *Grisar* v. *McDowell,* it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

Stanley v. *Schwalby,* 147 U. S. 508 (1892).

This was an action of trespass brought by certain individuals against United States army officers in command of the army post at San Antonio, Texas, for the purpose of trying the title to the land occupied by the army post. The United States District Attorney, on instructions of the Attorney General of the United States, intervened and set up title in the United States. The State Court dismissed the United States as a party. On this point the Supreme Court said *obiter*:

"We should remark, however, that from a very early period it has been held that even where the United States is not made technically a party under the authority of an act of Congress, yet where the property of the government is concerned it is proper for the attorney for the United States to intervene by way of suggestion, and in such case if the suit be not stayed altogether, the Court will adjust its judgment according to the rights disclosed on the part of the government thus intervening. Such was the leading case of *The Exchange,* 7 Cranch, 116, 147, where the public armed vessel of a foreign sovereign having been libelled in a court of admiralty by citizens of the United States to whom she had belonged and from whom she had been forcibly taken in a foreign port, by his order, the District Atorney filed a suggestion stating the facts, and the Circuit Court having entered a decree for the libellants, disregarding the suggestion, this Court, upon an appeal taken

> by the attorney of the United States, reversed the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the Court, said: 'There seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the attorney for the United States.'"

The Court then considered the merits and held that a plea of adverse possession, set up by the defendant, was good and might be availed of by the United States.

Decisions of the Inferior Federal Courts in Immunity Cases.

There have been a number of decisions in the District Court and Circuit Court of Appeals, mostly growing out of the late war. They may be classified as follows:

1. Cases holding that ships that are owned, manned and operated by private persons, although under requisition by a foreign sovereign, are *not* immune to process.

> *The Attualita,* 238 Fed. 909 (C. C. 4th Ct. 1916);
> (*The Luigi,* 230 Fed. 493, D. C. Pa., 1916 contains a dictum to the contrary.)

2. Cases holding that foreign navy transports, commanded by commissioned naval officers and manned by enlisted navy men, and foreign vessels engaged as army transports, are immune from process.

> *The Pampa,* 245 Fed. 137 (D. C. N. Y. 1917);
> *The Maipo,* 252 Fed. 627 (D. C. N. Y. 1918);
> *The Roseric,* 254 Fed. 154 (D. C. N. J. 1918).

3. The cases now before the Court where the vessels are alleged to be owned and in the possession of a sovereign, but are concededly engaged as merchant ships in the carriage of goods for hire; *The Pesaro, The Carlo Poma,* now argued, in which the lower courts allowed immunity and the *Glenedin,* previously argued but not yet decided, in which the District Court refused to release the vessel.

POINT II.

The extent of immunity.

From the foregoing review it is clear that the immunity of the property of a sovereign from the jurisdiction of courts is subject to many limitations and it is not always easy to draw the line fixing the extent of the immunity.

As Chief Justice Marshall said in the "Exchange" (7 Cr. 116, at p. 143):

> "* * * all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act."

The test is thus the presumed intent of the two sovereigns involved, a question partly—if not wholly—political.

How shall the Court apply this test to the new conditions growing out of the war?

The governments of the world have, as a result of

war conditions, built, or requisitioned millions of tons of shipping which they are still operating as ordinary merchant ships—a condition of which one could hardly have dreamed before the war.

How shall a Court regard such ships? What are the "views under which the parties must be supposed to act?"

The question is not simple, but two possible solutions are offered:

1. The Court may ascertain the extent of immunity claimed by the United States for vessels owned by it and operated by it as merchant ships. Is it not fair to infer that the United States intends to extend to other sovereigns the immunity it claims for itself and no other?

If this be the test then the question is answered by the legislation creating the Shipping Board—the legislation whereby the United States Government for the first time undertook to operate merchant ships. Section 9 of the original Shipping Act, 1916, reads in part as follows:

> "Every vessel purchased, chartered, or leased from the Board shall, unless otherwise authorized by the Board, be operated only under registry, or enrollment and license (American). Such vessels, while employed solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

Section 9 of the original Shipping Act, 1916, was supplanted by a new Section 9 by the Act of July 15, 1918 (40 Stat. L. 900; Public Act. No. 198, 65th Cong.).

The above quoted clause of the original Section 9 was retained verbatim in the amended Section 9 of the Act of July 15, 1918. The Shipping Act, 1916, was further amended in many respects by the Merchant Marine Act, 1920, approved June 5th, 1920 (Public Act, No. 261, 66th Cong., 2nd Sess.). The above quoted clause of Section 9 of the Shipping Act, 1916, was, however, left intact as originally worded in the original Shipping Act, 1916. It is submitted, therefore, that Congress in three successive years, to wit, 1916, 1918 and 1920, declared a policy that merchant ships of the United States should not be entitled to sovereign immunity. The confirmation of this policy in 1920 was subsequent to the decision by this court, in the "Lake Monroe" (250 U. S. 246), so Congress was fully aware of the full legal consequences of its re-declared policy.

It is true that Congress did, by the Suits in Admiralty Act, approved March 9th, 1920—approximately three months before Congress reaffirmed the policy set forth in Section 9 of the Shipping Act, 1916—declare that United States Government owned or possessed ships should not be subject to seizure under process *in rem*. (Section 1, Public Act No. 156, 66th Congress.) For the usual remedy *in rem*, Congress substituted a remedy *in personam* against the United States Government in cases where, aside from the governmental interest in the merchant vessel, a remedy *in rem* would normally lie. It is submitted that Congress did not thereby intend to derogate in any way from its policy as stated in Section 9 of the Shipping Act, declaring merchant vessels owned by the United States, subject to legal liability in the domestic courts. This contention is sustained by the fact that Congress in the Merchant Marine Act, 1920, passed subsequently to the Suits in Admiralty Act, re-enacted Section 9 of the Shipping Act, 1916, in this respect. It is submitted that the purpose of Congress,

in the Act of March 9, 1920, was merely to remove the inconvenience and impropriety of requiring the United States Government to furnish bonds in ordinary course, to accomplish the release of its ships, and that the second purpose was merely to avoid unnecessary delay to its ships when they were seized under process *in rem*. This contention is amply sustained in the hearings before Congressional Committees. It is further sustained by the fact that Congress did not provide in the Suits in Admiralty Act, a remedy *in personam* in cases where war ships were concerned. In other words, Congress in the legislation of 1920 clearly indicated that American warships were to continue immune from judicial process, but on the other hand, merchant vessels were to be subjected to judicial process, but the remedy, for practical convenience, was made *in personam* against the United States, rather than *in rem* against the ship.

This same policy in regard to merchant vessels is declared in Section 7 of the Suits in Admiralty Act, which provides that if a merchant ship owned or possessed by the United States is arrested in a foreign port, the Secretary of State, upon request of the Attorney General, is authorized to request immunity for the ship and to execute a bond or pledge the credit of the United States to the payment of any judgment that may be entered, in order to accomplish the release of the ship. It is submitted that this Section again clearly adopts the policy of liability of merchant vessels. By this Congress says simply, we will, through the Secretary of State accomplish the release of our merchant vessels arrested in foreign ports, but, at the same time, we will give bond, or pledge the United States to pay any judgment and we do not seek to oust the jurisdiction of the foreign court and are willing that the merits as to liability shall be determined by the court before which the action is instituted.

The United States, therefore, it is submitted, by voluntarily recognizing that its own merchant vessels should not be endowed with sovereign prerogatives, directly negatives any implication that it concedes an exemption to any similar ship claiming exemption by virtue of its sovereign character. It is clearly a sufficient implication to rebut and destroy the general implication on which is predicated any concession based on sovereign character. Section 9 of the Shipping Act, 1916, and the Suits in Admiralty Act, 1920, it is contended, must, as express statutory implications, dominate any general implication as to the sovereign attitude of the United States.

Furthermore, these statutory declarations by the United States are also sufficient notice, or implication, to a foreign sovereign, that the United States does not dignify such property with attributes of sovereignty, to the extent, at least, of exempting it from judicial process, without bond or pledge of payment of judgments, and consequently that the United States does not consent to accept such property of the foreign sovereign under such conditions.

As an inevitable consequence of this notice, or implication, the foreign sovereign is foreclosed from any expectation—at least any reasonable expectation—that his similar property will be received by the United States under concessions of immunity from judicial determination of liability for its acts.

Although it should be assumed, if any indication of the attitude of the United States on the question of equal treatment to its vessels appears necessary, reference is made to Section 26 of the Shipping Act of September 7, 1916, which provides:

> "the President is hereby authorized and empowered to secure by diplomatic action equal privileges

for vessels of the United States engaged in such foreign trade" (as used in Navigation laws, meaning vessels documented under the laws of the United States, and engaged in such foreign trade), and if by such diplomatic action, the President shall be unable to secure equal privileges, then the President shall advise Congress of the facts and his conclusions by a special message, if deemed important in the public interest, in order that proper action may be taken thereon."

In view of this Section 26, it is rather more difficult to conclude that the United States indulges in any implied derogation from its sovereign jurisdiction that results in putting its own property in its own ports of the United States to a disadvantage in comparison with the similar property of a foreign sovereign.

It should be borne in mind that the immunity doctrine of the *Exchange* and all extensions thereof are based on implication only, created by legal decision, without any sovereign declaration of exemption through statute or treaty. To be sure, certain immunities have been expressly created by statute and treaty, but such express immunities were not and are not the basis of the law of immunity from process invoked here. As a matter of fact, the *Parlement Belge* (*infra*) might well have gone off on the treaty provision. In the cases at bar, the Italian Ambassador suggests no treaty exemption and none exists.

In effect, certain conceptions of the dignity of sovereignty and its attributes led the courts, and rightly so, to build up a principle of immunities based on implied sovereign expectations and resultant implied sovereign concessions respectively. There is no sound reason why the local Court should not scrutinize the acts of the local sovereign at any particular time to discover whether or not the local sovereign's acts preclude the implication that he concedes certain immunities. It is contended that

the United States by subjecting the acts of its own ships under these conditions to legal determination, in the ordinary courts, both at home and abroad, clearly negatives, and incidentally precludes any implication of, intent on the part of the United States to recognize superior sovereign attributes in this class of property.

The original immunity having been erected by the courts on an implied attitude of proper respect on the part of the sovereign for the foreign sovereign, and having been properly extended to protecting the personal dignity of the foreign sovereign and his vicarious personal dignity through his direct representative, and also to the public safety of the foreign sovereign in his armies and his battleships, or his ships engaged in military enterprises, it is contended, that beyond this point, in view of Section 9, and Section 26, of the Shipping Act, and the Suits in Admiralty Act, implications of immunity cannot be reasonably fashioned.

There is obviously a limit somewhere to a conception of what is endowed with sovereign attributes. The world has long accepted the sovereign himself, his ministers, and instruments pertaining to the safety of the sovereign, as inherently endowed with sovereign attributes. In these days when various sovereigns are taking unto themselves additional activities under their respective conceptions of what are proper sovereign functions, it seems obvious that these various sovereigns will not be in accord as to what functions are sovereign in nature and what are private. Unless, therefore, the most extreme conception of sovereign function is to dominate the judicial process and administration of law of the United States, it is essential that a limit be drawn sooner or later.

The only limit that reasonably suggests itself is the

current attitude of the United States as to what is, or what is not, endowed with sovereign attributes. This is obviously so as a practical matter, and, as has been above set forth, failure to adopt such a limit is a direct negation of the absolute territorial jurisdiction of the United States within its own territory. It is well to remember throughout a discussion of this kind that not only is a foreign sovereign's dignity involved, but that the dignity of the United States should receive some consideration.

We respectfully submit, therefore, that it is not so much, as the learned Court intimated in the "Maipo" (Hough, J., Feb. 21, 1919, Southern District of New York, 259 Fed. 367) that the Court would be dictating to the foreign Government what the foreign Government should consider to be a Governmental function, but rather the Court would only be construing on principle a municipal law, in refusing to build up further immunity-creating implications of exemption, which violate by their unreasonableness, or inconsistency, political, economic and legal principles. A brief contemplation of the future of the aeroplane and Governmental activity in aerial enterprises shows the possible difficulties of any other rule.

If it be seriously contended that the controlling element is not the attitude of the *receiving* sovereign, but the attitude of the *foreign* sovereign as to which of his property carries sovereign attributes, so as to be entitled to immunity abroad, sufficient answer is found in the fundamental principal that the sovereign's territorial jurisdiction is total in him and exclusive and any derogation, therefore, must be by his consent, express or implied. If it is the *foreign* sovereign's attitude as to person or thing that touches his sovereignty, which determines immunities in foreign states, the local Government might be subject to "degradation," and the "laws to continual infraction"—*The Exchange* (7 Cranch, at page 143). Would it be seriously contended that if any

foreign sovereign should choose to endow all his subjects with attributes of sovereignty, and so publicly declare, any such subject could enter our ports irrespective of immigration law, and remain indefinitely and do as his fancy dictated free from restriction of local law applicable to the local sovereign's own citizens?

Furthermore, any argument that the S. S. "Pesaro" should be immune can gather no strength from any doctrine of "reciprocal immunities" (which, although it fundamentally rests on the "sovereign dignity" principle of Chief Justice Marshall, may have by common usage and acceptation acquired unto itself the status of a legal principle). The S. S. "Pesaro," if a United States Shipping Board vessel, owned and registered by the United States would under the same circumstances of operation and service be subject to process in the Italian courts, so far as the United States is concerned. The United States enjoys no immunity in Italian ports and is, therefore, free to deny immunity in its own ports. Furthermore, any doctrine of "reciprocal immunities" is itself one of implication and is subject to all the above considerations.

Finally, the execution of process in the present instance does not hail the foreign sovereign, or his personal officers before our courts. This property is not in his possession, or direct control. A private steamship company has the ship—under what sort of a charter, or operating agreement, we know not. The bill of lading nowhere mentions, or refers to the Italian Government, and the bill of lading is captioned "Lloyd Sabaudo," a joint stock company limited by shares, with its principal office in Genoa, and its United States agent, Messrs. Furness, Withy & Company, Ltd.

2. There is also a second alternative; the Court may regard the extent of immunity as a political question

and look to the Executive Department of our Government for an authoritative statement as to whether the particular vessel involved is or is not viewed by the Political Branch of the Government as entitled to immunity. This possibility is more fully dealt with in the second part of this brief.

The English Cases.

The first British decision was *The Charkieh*, L. R. 4. A & E. 59, 1 Asp. Mar. Law Cas. 581 (1873). The steamship "Charkieh" was in collision with the steamship "Batavier," and the owners of the "Batavier" filed a libel *in rem* against the "Charkieh." It appeared that the "Charkieh" was the property of "His Highness, the Khedive, as sovereign Prince of Egypt." An application was first made on behalf of the Khedive of Egypt to the Court of Kings Bench for a writ of prohibition forbidding the Admiralty to entertain the libel. This prayer was denied by the full bench (L. R. 4 A. & E 59, 1 Asp. Mar Law Cas. 533). The case then proceeded to a hearing before Sir Robert Phillimore. He reviewed the case of *The Exchange* and also the decisions of Mr. Justice Story in *United States* v. *Wilder*, 3 Sumner, U. S. First Cir., 313, and *Clarke* v. *New Jersey Steam Navigation Co.*, 1 Story, U. S. Cir. 528, as well as a number of other British and American cases, and held that the Court had jurisdiction over the "Charkieh" because she was operating as a merchant ship and not as a warship, saying, page 597:

> "This ship cannot claim exemption as a ship of war. She carries indeed the flag of the Porte, but she is not equipped in any sense for war, nor does she pretend to be so. Apart from the question of liability *jure gentium*, to which I have

adverted, I am not prepared to deny that the private vessel, for instance, the yacht, of the Sultan, though equipped for pleasure and not for war, would be entitled by international comity, operating (at least so long as it is not withdrawn by the State conceding it) as international law, to the same immunity as a ship of war; though dicta to the contrary may be found in some of the writings of some jurists. But it seems to me idle to contend, in the face of the evidence before me, that these six or seven ships are not trading vessels, to all intents and purposes, though they carry mail bags. But again I am not obliged to predicate this character of all these vessels: the one before me is actually chartered to a British subject, and has been by him publicly advertised like any other merchant vessel to carry cargo, for which he is to receive the freight. That this cargo is liable to a lien for salvage has not been denied; but suppose under the 24 Vict. c. 10 the owners of the cargo were to bring a suit *in rem* against the ship for damage to the cargo, must that suit be dismissed, and justice so far denied, because the ship was only chartered, and was not, according to the technical term of English law, demised to the British subject, and therefore remains the property of the Khedive? Such has been necessarily the contention of the counsel for the Khedive. I cannot assent to it; the mere statement appears to me to carry with it a refutation of the argument."

The later English cases, it is true, have overruled the "Charkieh," and it is important merely as the opinion of a distinguished Admiralty Judge and an interpretation by him of the state of the American law. The rule is now believed to be settled in England that a vessel owned by a foreign sovereign is immune from process, whether in the possession of officers of the foreign sovereign or not.

The Porto Alexandre, 36 Times L. R. 66, (Court of Appeal), 1919;

The Parlement Belge, 42 L. T. Rep. 273, 4 Asp. M. L. C. 234, 5 Prob. Div. 197;
The Broadmayne, 1916, P. 64, 114 L. T. Rep. 891, 13 Asp. Mar. Law. Cas. 356;
The Gagara, 1919, 35 Times L. R., p. 243, 14 Asp. M. L. C. 547 (Court of Appeal, Feb. 14, 1919).

It is to be noted that the English law has thus gone considerably beyond the decisions in this country, in that it grants immunity to the property of a foreign sovereign, even if not in his actual possession. This distinction is pointed out in the opinion of the Circuit Court of Appeals in the present case of the "Carlo Poma," p. 10. Thus, even if the present decision should be affirmed, the law of England and the United States would not thereby be rendered uniform. Nor is this a question in which uniformity between American and British law is necessarily to be expected. The British conception of a personal sovereign who has power through his ministerial officers to waive immunity, is fundamentally different from the conception of the sovereignty of the people as it exists in this country, and these two different concepts may well be expected to lead to different results in treating with the immunity of the property of domestic and of foreign sovereigns.

Briggs v. *The Light Boats,* 11 Allen 157.

Italian Law.

As both the vessels involved in these cases are Italian, it is interesting to note that by the law of Italy these vessels would not be immune from the process of the Italian Courts, nor would vessels owned by the United States and similarly operated be immune in

Italy. The Italian rule appears to be that only warships or ships used by the Government for warlike purposes are immune from process.

The Italian law is stated as above by Francesco Montefredini, a leading member of the bar of Italy, with offices at Rome and Naples, whose opinion we sought on the subject. The full text of his opinion is attached as an appendix to this brief (brief, pp. 57-60).

Therefore, if the "Carlo Poma" and the "Pesaro" are held to be immune from process in the American Courts, we have this anomalous situation. A vessel like the "Pesaro," owned by the sovereign and in its possession, but operated as a general merchant ship, would be denied immunity in the Italian Courts, whether owned or in the possession of the Italian Government or of the Government of the United States, and would be denied immunity by the American Courts if owned and possessed by the United States, as provided in the Merchant Shipping Act, but would be accorded immunity by the American Courts if owned and possessed by the Italian Government. It is believed that so anomalous a result should be avoided if possible.

PART II.

The admissibility and conclusiveness of the suggestion of the Ambassador.

Statement.

The District Court in the "Pesaro" held that the suggestion of the Italian Ambassador was (1) admissible in evidence and (2) uncontrovertible as to the facts and conclusions alleged therein—that no issue could be raised thereon. It is submitted that the mere statement of fact of an Ambassador over his signature and the seal of the Embassy, filed directly in a Court—the Department of State of the United States certifying only the official status of the Ambassador—is (1) inadmissible in evidence, and (2) if admissible, is not conclusive as to the facts and conclusions alleged therein.

Decided Cases as Authorities.

1. These precise questions, it is believed, are of novel impression in this Court. In the two cases decided by this Court, *The Exchange* (infra) and *The Davis* (infra) in which the immunity of Government property was involved, the suggestions of Governmental ownership and possession were submitted to the Court by the Attorney General of the United States.

In *The Exchange,* 7 Cranch 116, decided February 24, 1812, it appears from the statement of the case that

> "On the 20th of September, Mr. Dallas, the Attorney of the United States for the District of Pennsylvania, appeared, and (at the instance

> of the Executive Department of the Government of the United States, as it was understood) filed a suggestion to the effect * * *"

In *The Davis*, 10 Wall. 15, decided in December, 1869, the United States in its own answer by the Attorney General, claimed exemption for property belonging to the United States.

2. The doctrine that a direct suggestion by a foreign Ambassador to a local court is admissible has emerged from a series of cases in the District Court and Circuit Courts of Appeals, which will be referred to in their chronological order.

In *Long* v. *The Tampico*, 16 Fed. 491, decided May 22, 1883 (District Court, S. D. New York), the Court, by way of dictum, uses the following language at the bottom of page 496:

> "Although objection to the jurisdiction alone might doubtless have been raised upon the information of the attorney general of the United States, or the direct intervention of the accredited political representative of the Mexican Government, I see no reason to disregard the mode of intervention adopted in this case, viz., by some other agent of the Government, provided he was duly authorized thereto."

The Court proceeded to find that the Agent in the particular instance was not duly authorized.

In *The Luigi*, 230 Fed. 493, decided February 22, 1916 (District Court, E. D. Pa.), the suggestion was filed by the United States Attorney at the instance of the Attorney General, and affidavits of the Italian Consul were submitted only in support. A direct suggestion by an Ambassador was not involved, but it is interesting to note that when an attorney, as *amicus curiae*,

individually suggested the public character of *The Luigi*, the Court, Thompson, J., was of the opinion that

> "Inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government."

This opinion is consonant with the practice followed in both *The Exchange* and *The Parlement Belge* (L. R. 5 P. D. 197), in which the suggestions of Governmental ownership came from the Executive Department of the local Government.

In *The Attualita*, 238 Fed. 909, decided October 6th, 1916 (Circuit Court of Appeals, Fourth Circuit), it appears on page 910 that:

> "'On the 20th of September the United States attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, brought to the attention of the Court "that the Attorney General of the United States has received from the Secretary of State of the United States a communication, dated September 15th, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian steamship Attualita, which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian government, and was at the time of said attachment and is now in the service of the Italian government." The district attorney stated he was further directed to call the attention of the Court in this connection to *The Luigi* (D. C.), 230 Fed. 493, and concluded by stating that "in bringing this matter to the attention of the Court the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian government, but I present the suggestion as *amicus curiae*, as a matter of comity

> between the United States government and the Italian government, for such consideration as the Court may deem proper".'"

It is rather suggestive that evidence was taken in this case in respect of the relation of the Italian Government to this ship.

In *The Pampa*, 245 Fed. 137 (District Court, Eastern District of New York, August 29, 1917) the case was presented to the Court on a stipulation of fact which admitted that "The Pampa" was an Argentine naval vessel, manned by a navy crew.

In *The Florence H.*, 248 Fed. 1012 (Dist. Ct., S. D. N. Y., April 22, 1918), the Court, Learned Hand, D. J., in refusing to accept a suggestion as to the interests of the French Government, used the following language, beginning on page 1017:

> "That there may be embarrassment diplomatically, as Mr. Symmers also suggests, is of course possible; but such considerations are not justiciable by courts. A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court, which is not authorized to treat in any fashion with foreign powers, should be in consequence quite inaccessible to any suggestion which is based upon international considerations. I am aware that it has in some cases been said that, before assuming jurisdiction of causes involving aliens, the court may use its discretion. Whatevermay be the grounds which may in any case control that discretion, it appears to me plain that they should not include the possible diplomatic adjustments which a decree might make necessary. If the cause is to be stayed for such reasons, the most obvious proprieties demand that the suggestion shall arise from the only source to which the court has any right to look."

In *The Maipo*, 252 Fed. 627 (District Court, S. D. N. Y., July 8, 1918), the Court accepted the suggestion filed directly in the Court by the Chilean charge d'affaires (exercising Ambassadorial functions), his official status only verified by the State Department, and on page 628 says:

> "While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the Court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government."

Note—In *In re Baiz*, one Baiz sought a writ of prohibition to restrain the District Court from the exercise of its ordinary jurisdiction, on the ground that he was a diplomatic representative and immune from suit in the District Court. This Court says, on page 431:

> "The alleged want of jurisdiction (in the District Court) depends upon questions of fact. It was purely discretionary whether this evidence should be admitted at the time it was presented; and in a proceeding involving the inquiry under consideration, it was plainly our duty to permit it to come in, the petitioner being afforded, as he was, the opportunity for explanation and the introduction of such other evidence as he chose to produce."

This Court intimated that the certificate of the State Department would be conclusive as to the official status of the petitioner, but held that the Court did not wish "to dispose of this case upon the mere absence of technical evidence."

In *The Roscric*, 254 Fed. 154 (Dist. Ct., Dist. N. J., Nov. 22, 1918), the British Embassy, by Counsel, who appeared specially for this purpose, filed a suggestion. It appears further that this suggestion was supported by a deposition of the ship's master, which, although not offered in evidence, was produced for the information of the Court. In discussing the admissibility of the suggestion, the Court, Rellstab, D. J., on page 163, says:

> "As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction, because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as amicus curiæ for a foreign government—Judge Thompson said he 'was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.'
>
> "In *The Florence H., supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.
>
> "There may be good reasons in a given case why a suggestion from a foreign sovereignty

should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H.* I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified."

In *The Carlo Poma*, 259 Fed. 369 (Circuit Court of Appeals, Second Circuit, May 14, 1919) the Circuit Court of Appeals, referring to the suggestion filed by the Italian Ambassador, says on page 370:

> "That the suggestion was sufficient proof of the statements contained in it, is not seriously contested. We accept it as verity."

It may be added, parenthetically, that the sufficiency of the suggestion was objected to at all stages of the suit, but the record is possibly not clear on that point.

In *The Pesaro* (not reported) the Court held that the suggestion of the Italian Ambassador was admissible and could not be traversed, using the following language (Record, fol. 27):

> "MEMORANDUM OPINION OF COURT ENDORSED ON ORDER MADE HEREIN ON JANUARY 23, 1920. I consider that the relief prayed for in the petition of the libellant should be denied upon the ground that I hold the allegations therein or facts which may be offered in support thereof, are not admissible to controvert or question the veracity of the suggestion of the Italian Ambassador."

But the Court, in denying the motion to strike the petition from the record, uses the following language (Record, fol. 45):

> "My action in releasing the 'Pesaro' from arrest is now under review, and I am unable to see why the reviewing authority should not be apprised of all the facts that appeared before me, and which were considered in reaching my conclusion. Only by so doing, it seems to me, can the nature and extent of error, if any, be properly seen and corrected. The motion to strike out the petition is denied."

In *Mount Royal Steamship Company, Ltd.* v. *The Steamship Gul Djemal* (decided December 22, 1920, S. D. N. Y.—unreported) the Court, Knox, J., declined to adopt a suggestion filed by the Spanish Ambassador on behalf of the Turkish Government, the alleged owner of the S. S. "Gul Djemal." The Court held that, inasmuch as the Turkish Government had severed relations with the United States and relations had not been resumed, he must respectfully refer the Spanish Ambassador to the Department of State. In support of a motion for a rehearing, the proctors, appearing specially for the

Turkish Government, offered a letter, dated December 24, 1920, from the Acting Secretary of State of the United States to the Spanish Ambassador, which was written in reply to a letter from the Spanish Ambassador to the State Department, in which the Spanish Ambassador made representations to the State Department as to the ownership of the "Gul Djemal" and the fact that the "Gul Djemal" was under arrest in the District Court in New York. In its reply the State Department says: "Inasmuch as you have for a considerable period been Ambassador recognized by the Department as representing Turkish interests in the United States the Department will of course be glad to give consideration to any representations which you desire to make to this Government on behalf of the Ottoman Government in relation to the detention of the steamship 'Gul Djemal.'"

3. It will be noted from the above citations that in the early cases, including the leading cases of "The Exchange" and "The Parlement Belge," the facts on which immunity was granted were suggested to the Court by the executive branch of the local sovereign, and not by the representative of the sovereign seeking immunity. The first suggested departure from this practice—by way of the admission of a direct suggestion by the foreign ambassador—appears in *Long* v. *Tampico* (supra), in 1883 by way of dictum. *The Maipo* (1918), is apparently the first precise holding that a direct suggestion is admissible, which contains a citation in support of this doctrine—*In re Baiz*, 135 U. S. 403.

The doctrine of admissibility of direct ambassadorial suggestions was affirmed in *The Carlo Poma*, decided without citation of authority, and in *The Pesaro*, which is predicated on *The Carlo Poma*.

4. The doctrine, that a direct suggestion by a foreign ambassador to a local court is conclusive and final as to the facts and conclusions alleged therein, appears, it is submitted, for the first time in *The Carlo Poma* (supra), by implication, and in *The Pesaro* (supra), by express holding.

5. It is respectfully submitted, therefore, that both the admissibility and conclusiveness of a suggestion filed directly by the diplomatic agent of a foreign sovereign in a local court are questions of novel impression in this Court.

It is further respectfully submitted that the express decisions in the District Court and of the Circuit Courts of Appeals on these questions are the product of considerations raised by the recent war, and that this Court should scrutinize carefully the underlying principles of a practice which is fraught with far-reaching consequences.

ARGUMENT.

Preliminary Statement.

It is submitted that the doctrine of admissibility and conclusiveness of direct ambassadorial suggestions arises out of a failure to distinguish between the several functions of an ambassador.

An ambassador is the personal representative of his sovereign. He stands in the place of his sovereign. He is entitled to sovereign immunities and the prerogatives that his sovereign would enjoy were he personally present. Among such prerogatives are immunity from crimi-

nal process (Moore, International Law Digest, Vol. IV, page 631), immunity from civil process (Moore, International Law Digest, Vol. IV, page 635), and he may with propriety ignore a subpoena to appear as a witness (Moore, International Law Digest, Vol. IV, page 642).

He is entrusted with "political" questions arising between his sovereign and the sovereign to whom he is accredited. In political matters it is a well established principle of international law that his relations with the sovereign to whom he is accredited are to be carried on only with that sovereign in the latter's executive person—generally through the sovereign's foreign office—which has its analogy in the United States in the State Department—a department of the executive branch charged with international political questions (Moore, International Law Digest, Vol. IV, page 680). The impropriety of the presentation of "political" questions by a foreign ambassador to any branch of this government other than the State Department will be discussed hereinafter.

In another function, an ambassador represents his sovereign in matters other than "political." For instance, he appears, as will be more fully discussed later, as representative of his sovereign in litigation involving "judicial" questions in which his sovereign is involved. The exercise of such functions in "judicial" questions is apart from his functions in "political" questions, and the executive department of the government to which he is accredited is not directly concerned therein. In this function the foreign ambassador appears as agent of his sovereign just as an agent of a private party appears, and, it is submitted, under like privileges and limitations.

In another function, an ambassador may, under certain conditions, exercise consular functions (Moore, International Law Digest, Vol. IV, page 445).

In another function, an ambassador may use his good offices on behalf of a third sovereign who has severed relations with the sovereign to whom he is accredited (Moore, International Law Digest, Vol. IV, page 584).

POINT I.

If the ambassador, filing the direct suggestion in the instant cases, is presenting a "political" question, the suggestion is improper and impotent.

1. It is submitted that any suggestion of an ambassador which presents a "political" question should be submitted through the State Department. Although there are apparently no instances of objection by the State Department to a direct suggestion by a foreign ambassador to a judicial branch of this government (probably because the executive considered such suggestion as ordinary judicial pleadings or evidence) the cases where the executive department has complained of direct suggestions by ambassadors to Congress, the press, etc., are very numerous (Moore, International Law Digest, Vol. IV, pages 680-695). This principle was laid down by Mr. Jefferson, Secretary of State, as early as the year 1793 (Moore, International Law Digest, Vol. IV, page 680).

2. It is submitted that the statement of a local sovereign to his courts in "political" matters is the only statement, which his courts will accept as conclusive *per se*. A statement in "political" matters by a local sovereign (or an executive of a Republic) is accepted by the local courts as conclusive. These statements are statements of fact in regard to "political" questions,

which generally involve recognition of certain facts, which are dependent primarily on an attitude of the executive. Obviously, therefore, the statement of the executive must be final.

Underhill v. *Hernandez,* 168 U. S. 250;
Jones v. *U. S.,* 137 U. S. 202;
Mighell v. *Sultan,* Court of Appeal, L. R. 1894, 1 Q. B. D. 149;
Williams v. *Suffolk Insurance Co.,* 13 Peters, 415.

In *Williams* v. *Suffolk Insurance Co.,* the rights between two private litigants hinged on whether or not the Republic of Buenos Aires rightfully exercised control over the Falkland Islands. This question was in issue and the Court accepted as conclusive the statement of the Department of State, that the United States did not recognize the jurisdiction of the Republic of Buenos Aires over the Falkland Islands.

In *Mighell* v. *Sultan,* the Queens Bench Division accepted the statement by letter of the Secretary of State of Johore, to the effect that one Baker was in fact the Sultan of Johore. It will be noticed, however, that Johore was a dependency of Great Britain, so this case does not depart from the well established and unvaried rule, that it is the suggestion of the local executive branch of the Government to the local judicial branch of the Government which controls in regard to political questions.

3. It is submitted that the acts of a foreign ambassador, when he acts in "political" questions, are distinguishable from his acts, when he acts in "judicial" questions.

A foreign sovereign can sue in the courts in the United States in civil matters.

The Sapphire, 11 Wall. 164;
Republic of Columbia v. *Cauca Co.,* 106 Fed. 337;
King of Spain v. *Olivia,* 14 Fed. Cases 7814;
Republic of Mexico v. *de Arrangoiz,* 12 N. Y. Superior Court Reports 634.

In such cases the Ambassador appears as representative of his sovereign. He makes affidavits, verifies pleadings, etc., and the courts very properly will take judicial notice of his authority to act in such capacity.

It is submitted that the learned Court in the "Maipo" (supra) quoted *In re Baiz* only as authority, that an ambassador could execute and present pleadings and affidavits in support of pleadings. Reference will be made under Points II and III of this brief that such pleadings should, however, conform to ordinary rules of evidence, and that such pleadings and affidavits are not conclusive and final as to the facts alleged therein.

It is further submitted, parenthetically, that *In re Baiz* is in direct support of contention that suggestions of immunity based on "political" consideration should find their source as to facts in the State Department, and that the facts set forth in a direct suggestion of immunity can be controverted.

4. It is submitted, therefore, that if the foreign ambassador wishes to bind the Court by treating the question in issue as a "political" issue, then the suggestion should come to the Court through the State Department for the Court's consideration. If the State Department considers the question as to ownership and posses-

sion of a merchant ship to be a "political" question, then the suggestion of the State Department would probably be accepted by the Court as binding. The Court might even, without any impropriety, seek further information as to the facts from the State Department. In any event, a private party litigant would have an opportunity to present his case before the State Department and have it reflected in any suggestion made by the State Department to the Court.

Conclusion.

It is, therefore, respectfully submitted that (1) a suggestion as to a "political" question should come to the local courts from the local sovereign, that is, in the United States, from the State Department; (2) if a foreign ambassador seeks to oust the jurisdiction of a local court by treating the question before that court as a "political" question, the suggestion in regard to that "political" question and the allegations of facts thereof should come to the local court from the local sovereign, that is, in the United States, from the State Department; (3) a direct suggestion by a foreign ambassador to a local court, without reference of the "political" question to the executive department of the local sovereign, can not, after presentation to the local court in the guise of a "non-political" submittal, suddenly acquire the force of a "political" suggestion by virtue of a confused *ex post facto* reference to the binding effect of a local executive's suggestion in political matters; (4) as a suggestion filed by the foreign ambassador in regard to a "political" question, the suggestion in the instant cases is improper and impotent.

POINT II.

If the foreign ambassador in filing the suggestion is presenting a "judicial" question, the suggestion is inadmissible in that it does not meet the requirements of the ordinary rules of evidence.

1. It is submitted that the foreign ambassador, if he appears before a local court as the representative of his sovereign in litigation in which his sovereign is involved, is, as to the evidence he submits, controlled by the same rules of evidence as is any other litigant. In other words, the evidence offered by the foreign ambassador, including written statements made by him, must conform to rules of evidence prevailing in ordinary litigation.

The ambassador's suggestion in the instant cases is in the nature of an affidavit in support of certain pleadings, to wit, a motion made by counsel, appearing specifically for the sovereign, seeking the release of the ship.

2. The suggestion being merely an unverified *ex parte* statement in writing, it is submitted, without citation of authority, it is inadmissible in evidence.

> (Note.) If the suggestion should be given by this Court the force and status of an affidavit, reference is made to "Point III" (infra) for a discussion of the consequences.

3. The *ex parte* statement of an ambassador, such as the suggestion in the instant cases is, is not under ordinary rules of evidence admissible as a public record, nor as an authenticated copy of a public record. The suggestion does not purport to be a presentation of a

public record under the verification of a public officer charged with keeping a public record intended as a memorial of the act recorded. On the contrary, the suggestion is merely a recital of facts and conclusions of law signed by an individual.

22 Corpus Juris, page 791, et seq.

4. The suggestion is not admissible as a certificate of a public officer.

Church v. *Hubbart*, 2 Cranch 187;
The Alice, 12 Fed. 923;
Edison Electric Light Co. v. *Electric Engineering Supply Co.*, 60 Fed. 401;
U. S. v. *Lew Pow Dew*, 119 Fed. 786;
22 Corpus Juris, Sec. 922, page 809 (generally).

In *Church* v. *Hubbart* the proof of a foreign law was involved, which, it is submitted, is analogous to the proof of ownership of property by a foreign sovereign. This Court, Marshal, Ch. J., said, beginning on page 235:

> "Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice. The principle that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received, which presupposes better testimony attainable by the party who offers it, applies to foreign laws, as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.
>
> In this case, the edicts produced are not verified by an oath. The consul has not sworn; he

has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws: they can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated, that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The Court will never require such testimony. In this, as in all other cases, no testimony will be required, which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed, that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact should appear to the court. Nor can it be presumed, that any difficulty exists in obtaining a copy. Indeed, in this very case, the very testimony offered would contradict such a presumption. The paper offered to the Court is certified to be a copy, compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate. It is asked, in what manner this oath should itself have been authenticated, and it is supposed, that the consular seal must ultimately have been resorted to for this purpose. But no such neces-

> sity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury."

In *The Alice* (District Court, S. D. Florida), in holding that a consular certificate that a copy of a bill of lading was a true copy of the original, did not make the copy admissible in evidence, the Court, at the bottom of page 924, uses the following language:

> "There is another point which would rule out the copy as authenticated were the one considered insufficient. It has been conclusively decided in the Courts of the United States that a consular certificate cannot be accepted as evidence, except where it has been made such by a statute."

In *Edison Electric Light* v. *Electric Engineering Supply Co.,* Circuit Court, N. D. N. Y., the Court at page 403 says:

> "The defendant also introduced a certificate from the Russian Department of Trade and Manufacture; that the patent expired or became 'exhausted' in December, 1891. This certificate is criticized by the complainant as not being sufficiently authenticated. I am inclined to think that the absence of a seal and the signature of a superior officer of the Russian Government renders the certificate inadmissible."

In *U. S.* v. *Lew Pow Dew,* the District Court, N. D. N. Y., on page 789, uses this language:

> "While this is not the case of a judgment, it illustrates one principle contended for, that the certificate of an officer is worthless as evidence unless the making of it was an official duty, and even then it is not evidence except so far as made such by some statute. No more loose, dan-

gerous, and unsatisfactory mode of proving the judgment of a court could be devised than to permit the introduction in evidence, against objection, of the mere unsworn statement of a commissioner that he has made certain adjudication, when there is no statute making it his duty to make such a certificate. It is not the best evidence, nor is it sworn evidence, nor is it made evidence by any statute. 'A consular certificate is not evidence of any act, except as provided by statute.' *The Alice* (D. C.), 12 Fed. 923; *Levy* v. *Burley*, 2 Sumn. 355, Fed. Cas. No. 8,300; *Church* v. *Hubbart*, 2 Cranch 187, 2 L. Ed. 249; *U. S.* v. *Mitchell*, 2 Wash. C. C. 478, Fed Cas. No. 15, 791. There is far less reason for admitting in evidence the mere certificate of a United States commissioner as to the terms and effect of some adjudication made by him."

Conclusion.

It is respectfully submitted, therefore, that the suggestion in the instant cases is not admissible *per se*, under general rules of evidence.

POINT III.

If the suggestion of the ambassador is admitted in evidence as being in the nature of an affidavit by the ambassador, in reference to a "judicial" question, the suggestion is not conclusive but is traversable.

It is still urged that the suggestion is inadmissible in evidence. If, however, the suggestion is, by virtue of the signature of the ambassador and the seal of the

embassy, although unverified, accepted as an affidavit in support of pleading, it is submitted that the suggestion is only *prima facie* evidence and is traversable.

1. It is submitted that, at best, the suggestion is only *prima facie* evidence.

In *Church* v. *Hubbart*, 2 Cranch 187, this Court, Marshall, Ch. J., at the bottom of page 238, said:

> "If it be true, that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified."

2. It is submitted that the affidavit of a foreign ambassador submitted in a local court is traversable.

Rep. of Mexico v. *de Arrangoiz*, 12 N. Y. Superior Court Reports, 637.

In the *Republic of Mexico* v. *de Arrangoiz*, decided in January, 1856, the Republic of Mexico sued to recover certain funds which the plaintiff contended belonged to it. The order of arrest, which issued, was founded upon the affidavit of one Juan N. Almonte, Minister Plenipotentiary of the Republic of Mexico to the United States. A motion to vacate the order was founded on the alleged insufficiency of the affidavit and also a counter affidavit purporting to show that the defendant acted as a special agent and not as a salaried officer, as had been set forth in the affidavit of the Minister Plenipotentiary. There seems to have been no question as to the right of the defendant to raise an issue of fact.

It is respectfully submitted that it would have out-

raged all sense of justice, if the affidavit of the Mexican Minister Plenipotentiary had been conclusive and uncontrovertable as to the facts alleged therein.

3. It is submitted that, in the instant cases, the ambassador apparently has preferred to waive the "political" aspect of the question affecting his sovereign. He does not approach the State Department with his question. He makes a statement to the local Court as a non-political submittal. In this connection it is significant that the State Department of the United States has not hesitated in a "non-political" question to suggest directly to a foreign sovereign that that foreign sovereign request his ambassador to the United States to appear and testify.

In Moore, International Law Digest, Vol. IV, page 643, a case is cited where the United States requested the Dutch Government to instruct its Minister to appear and testify as to a homicide, which the Dutch Minister had witnessed. The Dutch Minister was authorized by his Government to make his declaration under oath at the Department of State, but the Dutch Minister added "it is understood that no mention is to be made of a cross-examination, to which I could not subject myself." It is of further interest, in connection with the instant cases, that the "declaration was not taken, as the district attorney stated that it would not be admitted as evidence." Other cases of this nature involving requests that diplomatic representatives should testify may be found in Moore, International Law Digest, Vol. IV, p. 642, Section 662.

It is submitted, therefore, there would be no impropriety in the instant cases, in a decision by the Court that, in view of the traverse of the suggestion, the ambassador should submit further evidence, by personal testimony or otherwise. The raising of an issue of fact on

evidence submitted in a "judicial" question, involves no greater disrespect to the foreign sovereign in the person of his ambassador than does the refusal of the State Department to accept as verity the representations of the foreign ambassador in "political" questions.

Conclusion.

It is, therefore, submitted that, when a foreign sovereign comes into our Courts directly to claim property, there is raised a "judicial" question and the facts must be tried on the merits according to the rules of evidence. Obviously, unless a question is decided on the merits of the facts, it is paradoxical to refer to it as a "judicial" question.

It is submitted that the question whether or not a foreign sovereign owns or possesses certain property might be either a "judicial" or "political" question. Parenthetically, if it is a "political" question, the suggestion of that fact should come through the executive branch of the local sovereign, whose judicial branch is to be affected thereby. If, as the ambassador in the instant cases apparently considered it, the ownership and possession of a merchant ship is a judicial question, any direct suggestion by the foreign ambassador can not deprive the question of its judicial nature or the Court of its judicial function.

The United States of America, when it comes into the courts of the United States as a party plaintiff or as a party defendant, submits itself to the ordinary process of a judicial trial and asks no exceptional extra-legal privileges.

A brief consideration of the consequences of any other conclusion, in connection with the situation presented by the affidavit of the Mexican Minister Plenipotentiary in the case of the *Republic of Mexico* v. *de Arrangoiz* will, it is submitted, be convincing.

General Conclusion.

It is respectfully submitted, therefore, that (1), if submitted as a "political" submittal, the suggestion in the instant cases is improper and impotent (2), if submitted as a "judicial" submittal, the suggestion is inadmissible under general rules of evidence, and (3), if admitted in evidence as having the status of an affidavit, the suggestion is only *prima facie* evidence and is traversable.

PART III.

The question of immunity is a question of jurisdiction.

The appeal to this Court in the "Pesaro," No. 317, October Term, 1920, is properly taken under Section 238 of the Act entitled, "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," in that the question of immunity is a question of jurisdiction within the meaning of said Act.

The Alliance, 70 Fed. 273;
The Annie Faxon, 87 Fed. 961;
The Davis v. *Cleveland, C. C. & St. Louis Ry. Co.*, 156 Fed. 775;
U. S. v. *Jahn*, 155 U. S. 109;
The Resolute, 168 U. S. 437.

January, 1921.

Respectfully submitted,

HARRINGTON, BINGHAM & ENGLAR,
Proctors for Petitioner and Appellants,
64 Wall Street,
New York City.

D. ROGER ENGLAR,
OSCAR R. HOUSTON,
HAROLD V. AMBERG,
Of Counsel.

APPENDIX.

AVV. FRANCESCO MONTEFREDINI.

Naples, June 21st, 1920.

Comm. J. P. Spanier,
Naples.

I have your letter of even date enclosing copy of letter dated June 1st from Mr. Amberg and interrogatories drawn up by this gentleman.

1. QUESTION. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

ANSWER. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are therefore subject to arrest, but always on the authority of the President of the Tribunal.

2. QUESTION. If such a ship is not immune from arrest because of its ownership or because it is operated as a merchant vessel by a private steamship company, is it necessary to bond the ship out pending the determination of the claim in order to accomplish the ship's release?

ANSWER. The U. S. S. B. steamers are subject to arrest, as above, only because they are *merchant* vessels, as according to the Italian law there is no difference

between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

To accomplish the ship's release the Captain or the agent usually request the President of the Tribunal to be allowed to give a bond (deposit of money or bank guarantee) in proportion to the claim, and in nearly every instance, this request is granted.

In the very recent case of the S. S. "Coahoma County" belonging to the Shipping Board, arrested in Genoa, I have succeeded in inducing the Ministry of Transports to authorize the Harbor Master at Genoa to release the vessel on receiving a letter of guarantee from the American Consul there, and this without taking into consideration the legal proceedings which will be carried on independently, but the decision is to be recognized by the Shipping Board.

A similar proceeding was followed by the American Government in the case of the Italian steamer "Argentina" (Cosulich Line), arrested in New York.

3. QUESTION. If such a ship is immune from arrest in the Italian Courts, is it because of the ownership of the vessel and in spite of the fact that it is operated as a merchant vessel by a private steamship company for the account of the United States?

ANSWER. The foregoing answers cover this point.

4. QUESTION. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

ANSWER. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest. This was simply a legal point, and the steamer was

immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest.

5. QUESTION. Is a ship owned by the Italian Government but operated by a private Italian steamship company as a merchant vessel for the account of the Italian Government immune from arrest in the Italian Courts?

ANSWER. See Answer No. 4.

6. QUESTION. If a ship as set forth in No. 4 or No. 5 above is not free from arrest in the Italian Courts, what is the nature of the guarantee that must be given in order to release the ship from arrest pending the determination of the claim?

ANSWER. To secure the release in Italian ports of an Italian steamer it is usual to submit a request to the President of the Tribunal, who will decide what sum is sufficient to cover the claim, and this sum must be either deposited or a bank's guarantee given for the same amount.

7. QUESTION. If any ship owned by foreign Government is immune from arrest in the Italian Courts, how are the facts establishing the ownership of the foreign Government presented to the Court? For instance, assuming that the Italian law exempts from arrest a particular United States ship, would the filing of a statement to this effect by the United States Ambassador be sufficient or would the Italian Courts require proof of the facts set forth in such statement of the United

States Ambassador, either before the Court or some other Government official?

ANSWER. As above stated, no *merchant* ship owned by a foreign Government is immune from arrest. In every case where it may be necessary to establish the ownership either the Ship's Register or a declaration from a consul is considered sufficient.

Should either you or Mr. Amberg desire any further information I will be pleased to furnish same at your request.

Yours sincerely,

F. MONTEFREDINI.

United States Supreme Court.

October Term, 1920.
No. 317

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners trading under the firm name of GIOVANNI LUZZATO & SON
Appellants

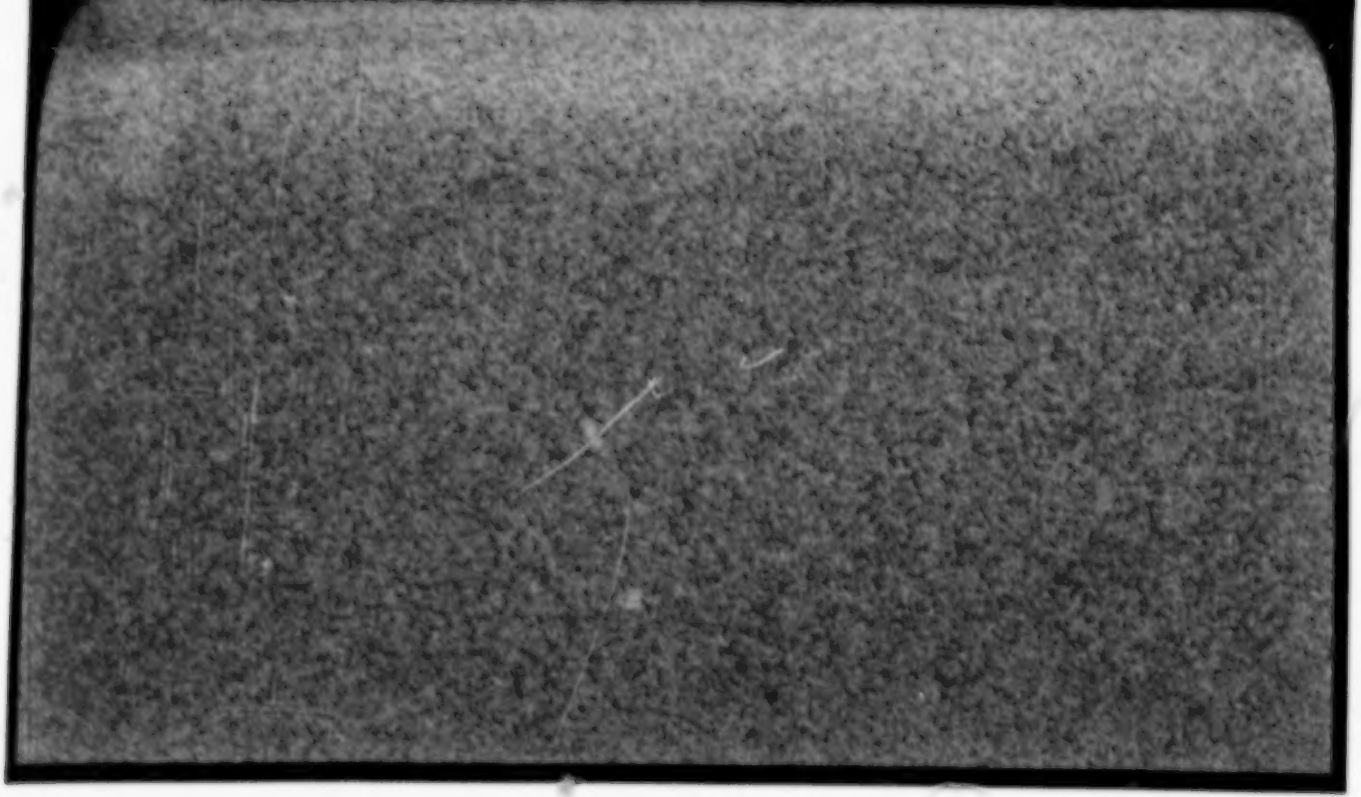
against

Steamship PESARO,
Appellee

MOTION BY THE APPELLEE TO ADVANCE.

JOHN R. WOOLLEY,
Counsel for the Steamship PESARO, appellee
specially for the purpose of claiming
priority and not for other purposes.

R. H. Tynan, Printer, 203-5 Pearl Street, New York.



UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, copartners, trading under the firm name of GIOVANNI LUZZATO & SON, Appellants, *against* STEAMSHIP PESARO, Appellee.	OCTOBER TERM, 1920 No. 317

Sirs:

PLEASE TAKE NOTICE that on Monday, November 22nd, 1920, at the opening of Court on that day, or so soon thereafter as counsel can be heard, we shall make a motion on the annexed affidavit, before the Supreme Court of the United States, at the Capitol, Washington, D. C., that the above entitled case be advanced for hearing so that it can be argued at the same time as the case of Giuseppe Cavallaro, Petitioner, vs. Steamship *Carlo Poma*, her engines, etc.; Kingdom of Italy, Claimant, which is No. 167 on the Docket of the October, 1920, Term of the Supreme Court of the United States, and we shall then and there also ask the Court to grant the petitioner

such other or further relief in the premises as may be just.

Dated, November 16, 1920.

Yours, etc.,

JOHN M. WOOLSEY,

Counsel for the Steamship *Pesaro*, appearing specially for the purpose of claiming immunity and for no other purpose.

To:

MESSRS. HARRINGTON, BIGHAM & ENGLAR,
Proctors for Appellants,
64 Wall Street,
New York City.

UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, copartners, trading under the firm name of GIOVANNI LUZZATO & SON, Appellants, *against* STEAMSHIP PESARO.	OCTOBER TERM, 1920 No. 317

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

1. I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors appearing specially for the steamship *Pesaro*, for the purpose of claiming immunity and for no other purpose.

I am a member of the bar of the State of New York and of the bar of this Honorable Court.

I have appeared specially in this Court on behalf of the Italian Government for the purpose of claiming immunity of the Italian steamship *Pesaro* and for no other purpose.

2. A libel was filed by the firm of Giovanni Luzzato & Son against the steamship *Pesaro* in the United States District Court for the Southern District of New York,

on January 5, 1920, to recover for alleged damage to a consignment of olive oil. *Pesaro Record,* page 1, folios 1 to 4.

3. In pursuance of the usual monition *in rem* the Italian steamship *Pesaro* was arrested by the United States Marshal for the Southern District of New York. *Pesaro Record,* page 3, folios 6-7.

On January 20, 1920, the Ambassador of the Kingdom of Italy filed a suggestion of immunity made at Washington, January 15, 1920, that the steamship *Pesaro* was at the time owned by the Government of the Kingdom of Italy and in possession of the Government of the Kingdom of Italy, in the person of a master employed and paid by said Government, and was wholly manned and operated by a master, officers, engineers and crew employed and paid by said Government. *Pesaro Record,* page 6, folios 11-12.

The said suggestion was accompanied by the certificate of the Secretary of State, the Honorable Robert Lansing, done at Washington, on the 16th day of January, 1920, certifying that the Italian Ambassador, Honorable Camillo Romano Avezzana, was duly accredited to the United States Government as Envoy Extraordinary and Minister Plenipotentiary of Italy. *Pesaro Record,* page 5, folio 10.

4. In pursuance of this suggestion the vessel was discharged from her arrest and attachment by the Honorable John C. Knox, United States District Judge, who stated that he felt bound to do so under authority of *The Carlo Poma,* 259 Fed. 369 (C. C. A., 2nd Circuit, May

14, 1919), and an order was entered accordingly by said Judge. *Pesaro Record,* page 12, folios 24 to 26. Cf. *Carlo Poma Record,* page 8, folios 16-20.

5. Thereafter the libelant took an appeal direct to this Court from the United States District Court for the Southern District of New York.

This appeal was allowed on April 3, 1920, by Judge Knox, and at the same time he issued and filed a certificate, in alleged conformity with Section 238 of the Act entitled, "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," approved March 3rd, 1911, Chapter 231, as amended, that he released the vessel on the ground that the United States District Court, sitting as a Court of Admiralty, had no jurisdiction over the steamship *Pesaro* because the vessel was the property and in the possession of a foreign Government. *Pesaro Record,* page 17, folios 36-37. Cf. *Carlo Poma Record,* page 3, folios 6-7.

6. It will be seen, therefore, that whilst the procedure by which this case has reached this Court differs from the procedure by which the case of the *Carlo Poma* reached this Court, the latter having been taken up by *certiorari* from the United States Circuit Court of Appeals for the Second Circuit, the questions involved are in fact the same and have been found by the Judge who decided the present case to be the same.

7. The questions of law involved, other than the question of the propriety of an appeal direct to this Court from the District Court in an immunity case, is the same

in both cases because the question involved in both cases is

A. Whether a certificate by a duly accredited foreign Ambassador is conclusive evidence as to whether a vessel is a public or private vessel and, consequently, as to whether she is amenable to the process of our admiralty courts or not, and

B. Whether the courts should receive such certificates when offered by foreign Embassies direct.

8. These questions are of great practical importance for the reason that there are many cases pending throughout the United States District Courts in Admiralty in this country in which these or similar questions regarding Ambassadorial certificates are involved, and it is of the utmost importance to the orderly procedure of litigation in the Lower Federal Courts that these questions should be finally disposed of by a decision of this Court.

9. Your deponent has been concerned in many cases in which these questions have been involved and the lower Courts have usually received the certificate, although in one or two instances the Courts have refused to receive them.

10. The reasons for requesting that this case should be advanced, to be argued at the same time as the *Carlo Poma*, are—

A. That the questions of immunity and practice involved in the two cases are identical,

B. That there has not, so far as your deponent

is aware, been any decision by this Court which deals with the precise questions here involved,

c. That owing to the gravity, novelty and importance of the questions involved and the fact that your deponent is involved in many cases in which the same questions are involved, he is anxious to have an opportunity to argue these questions at the time when the case of the *Carlo Poma* is argued.

11. Counsel for the appellants in this case, who are also counsel for the petitioners in the *Carlo Poma* case, have approved this application, as will be seen by their certificate at the end hereof.

WHEREFORE, it is submitted, that it is appropriate that this case should be argued at the same time as the argument of the case of *The Carlo Poma*, No. 167 of the October Term, 1920, and it is prayed that this Court may so order.

JOHN M. WOOLSEY.

Sworn to before me this 18th day of November, 1920.
HARRISON LILLIBRIDGE,
Notary Public,
New York County.

New York County Clerks No. 393
New York Register No. 1418
Commission expires March 30 1921

CERTIFICATE.

We do hereby certify that we have examined the foregoing motion, and, in our opinion, it is well founded and entitled to the favorable consideration of this Court.

D. Roger Englar,
Oscar R. Houston,
Of counsel for Appellants herein and for Petitioners in No. 167, *The Carlo Poma.*

United States Supreme Court

October Term, 1910
No. 317

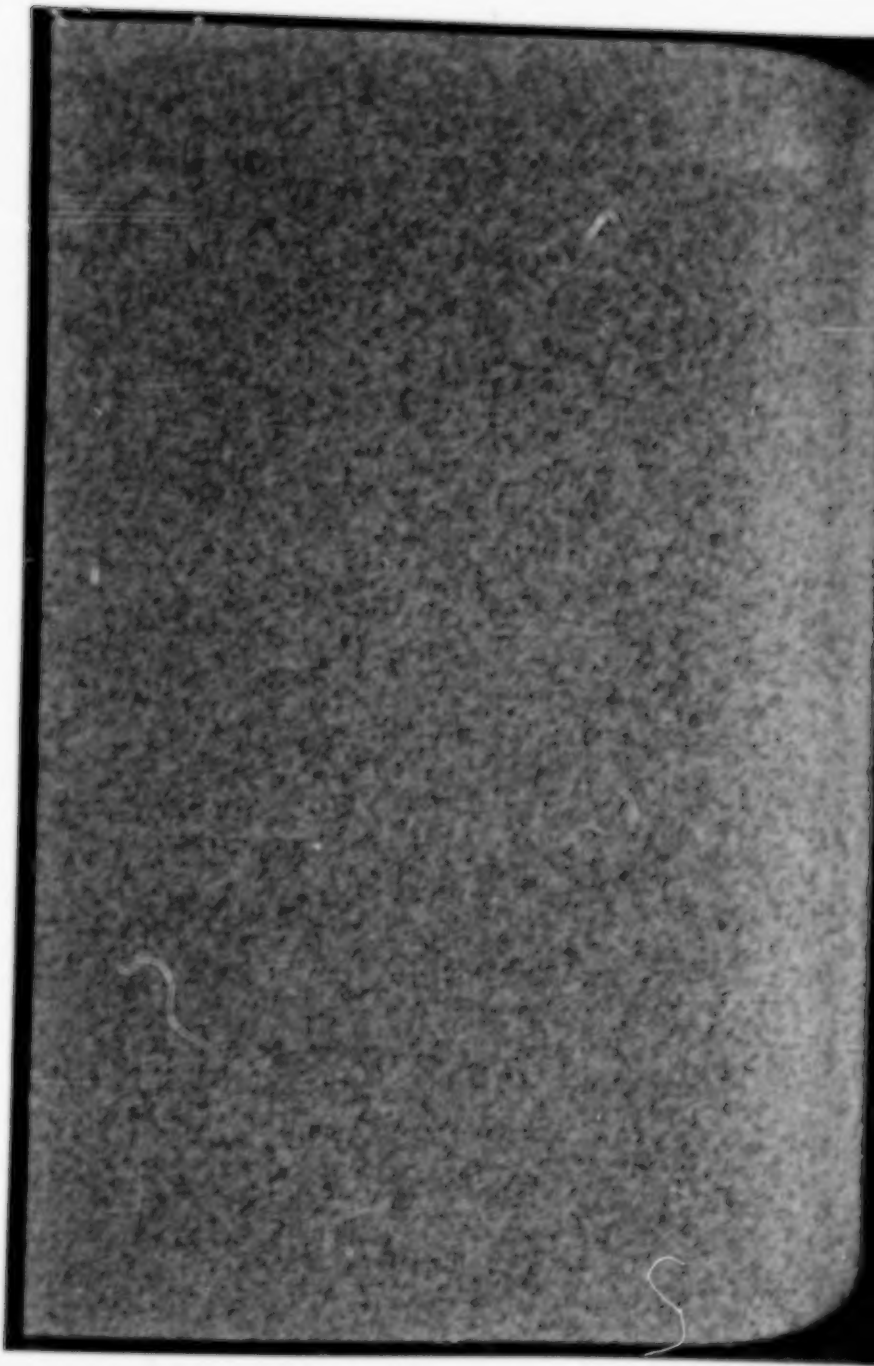
GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, doing business under the firm name of GIOVANNI LUZZATO & SON,
Appellants.

against

STEAMSHIP PESARO,
Appellee.

MOTION BY THE APPELLEE TO DISMISS OR AFFIRM.

JOHN M. WOOLSEY,
Proctor for the Steamship "Pesaro," appearing specially for the purpose of claiming immunity and not by other motion.



UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, Trading Under the Firm Name of GIOVANNI LUZZATO & SON,
Appellants,

against

The Steamship PESARO.

October Term,
1920.
No. 317.
Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that the annexed motion to dismiss or affirm will be presented to the Supreme Court of the United States when the above case is called for argument.

Dated, New York, December 24th, 1920.

Yours, etc.,
JOHN M. WOOLSEY,
Counsel appearing specially for the steamship PESARO for the purpose of claiming immunity and for no other purpose.

To:

D. ROGER ENGLAR, Esq.,
OSCAR R. HOUSTON, Esq.,
Counsel for Appellants.

UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, Trading Under the Firm Name of GIOVANNI LUZZATO & SON, Appellants, *against* Steamship PESARO.	October Term, 1920. No. 317.

NOW COMES the appellee by its counsel, appearing specially for the Italian Ambassador to the United States for the purpose of claiming immunity for the steamship PESARO and for no other purpose, and on the record herein moves—

I. That this Court dismiss the appeal herein on the ground that this Court is without jurisdiction of this appeal because,

A. The appeal was improperly taken from the District Court direct to this Court under Section 238 of the Act entitled, "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary", commonly cited as "The Judicial Code", approved March 3rd, 1911, Chapter 231*, and

*The relevant portion of Section 238 of the Judicial Code is as follows:
"Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; * * *"

B. The certificate as to question of jurisdiction (Record, pages 17-18) made by Honorable John C. Knox, the District Judge who allowed the appeal, was erroneous for the reason that a question of immunity is not a question of jurisdiction within the meaning of the said Act;

And in the alternative,

II. That the Court should affirm the order below on the ground that the decision of the District Court releasing the PESARO from arrest and declaring her immune was correct, or

III. That the Court should grant the appellee such other or further relief as may be just in the premises.

Dated, New York, December 24, 1920.

JOHN M. WOOLSEY,
Counsel appearing specially for the steamship PESARO for the purpose of claiming immunity and for no other purpose.

Supreme Court of the United States

OCTOBER TERM, 1920.
No. 317.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, trading under the firm name of GIOVANNI LUZZATO & SON,

Appellants,

against

THE STEAMSHIP *PESARO*,

Appellee

BRIEF FOR APPELLEE.

JOHN M. WOOLSEY,
Counsel.

SYNOPSIS OF POINTS

FIRST POINT.

SECOND POINT.

ALPHABETICAL INDEX OF CASES CITED IN BRIEF FOR APPELLEE.

MISCELLANEOUS.

UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, Trading Under the Firm Name of GIOVANNI LUZZATO & SON, Appellants, vs. THE STEAMSHIP PESARO, Appellee.	OCTOBER TERM, 1920 No. 317

BRIEF FOR APPELLEE.

This case comes to this Court by direct appeal from the United States District Court for the Southern District of New York on a certificate of an alleged question of jurisdiction, purporting to be in pursuance to Section 238 of the Judicial Code, granted by the Honorable John C. Knox, United States District Judge. Folios 36 to 38.

The propriety of this direct appeal in a case, in which as here, a question only of immunity is involved, is challenged by the appellee on a motion to dismiss or affirm returnable on the argument.

The decision below, which was in memorandum form, was not reported.

The Facts.

The libel, filed January 5, 1920, was brought for alleged damage to 290 cases of olive oil shipped on board the *Pesaro* on August 30, 1919, at Genoa, Italy, and delivered in an alleged damaged condition in New York on September 17, 1919. The libelants, claiming through certain mesne assignments of the bills of lading, contend that their damage amounted to $4,800. Folios 1-3.

A monition issued in the usual course to the United States Marshal for the Southern District of New York and the vessel was arrested thereunder by him on January 19, 1920. Folios 6-7, 9.

On January 20, 1920, a special appearance and suggestion by Baron Avezzana, Ambassador of the Kingdom of Italy to the United States, under the seal of the Embassy, was filed in the District Court:

> "Baron Camillo Romano Avezzana, Ambassador of the Kingdom of Italy to the United States of America, through Kirlin, Woolsey & Hickox, proctors appearing specially for the Italian steamship *Pesaro,* for the purpose of claiming immunity and for no other purpose, respectfully suggests to the District Court of the United States for the Southern District of New York, that said steamship *Pesaro* at all the times mentioned in the libel and complaint of Giovanni Luzzato and Joseph G. Luzzato, co-partners doing business under the firm name and style of Giovanni Luzzato & Son, against the steamship *Pesaro* was, since has been, and now is, owned by the Government of the Kingdom of Italy, and is now in the possession of the Government of the Kingdom of

Italy, in the person of a master employed and paid by said Government, and is wholly manned and operated by a master, officers, engineers and crew employed and paid by said Government.

Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from the process of this Court.

Done at the Embassy of the Kingdom of Italy. Washington, D. C., January fifteenth, 1920.

[SEAL] ROMANO AVEZZANA."

Folio 11.

This suggestion was accompanied by a certificate, dated January 16, 1920, from the Secretary of State, reading as follows:

"UNITED STATES OF AMERICA,

Department of State:

To all to whom these presents shall come, Greeting:

I certify that Baron Camillo Romano Avezzana whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Envoy Extraordinary and Minister Plenipotentiary of Italy.

In testimony whereof I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department at the City of Washington, this 16th day of January, 1920." Folio 10.

On January 20, 1920, after a hearing Judge Knox made a memorandum order vacating the attachment. This order read as follows:

> "Upon the suggestion of the Italian Ambassador filed herein to the effect that the S. S. *Pesaro* is owned by the Italian Government and now in its possession and manned by a crew of said Government, I vacate the attachment herein, conceiving myself so bound to do under the authority of the *Carlo Poma* decided by the Circuit Court of Appeals for this Circuit." Folio 12.

In pursuance of this order and on January 20, 1920, the United States Marshal for the Southern District of New York discharged the *Pesaro* from his custody. Fol. 7.

On January 21, 1920, after the discharge of the vessel as above noted, a petition was filed by the proctors for the libelants in which they sought to traverse the suggestion of the Italian Ambassador. Folios 13-17.

On January 23, 1920, Judge Knox made and filed a formal order in the case. *He did not dismiss the libel but merely released the vessel.* His order contained recitals of what had happened in the case and reaffirmed his memorandum order, above set forth, and released the steamship *Pesaro* from seizure, declaring her immune so long as she is under the ownership and possession of the Government of the Kingdom of Italy. Folios 24-26.

At the same time Judge Knox made the following endorsement on the said order:

> "I consider that the relief prayed for in the petition of the libellant should be denied upon the ground that I hold the allegations therein or facts which may be offered in support thereof are not admissible to controvert or question the veracity

of the suggestion of the Italian Ambassador." Folio. 27.

Thereupon an appeal, with assignment of errors, was taken from the United States District Court direct to this Court. Folios 28-33.

The appeal was allowed by Judge Knox, and on April 3, 1920, he signed a certificate stating that a question of jurisdiction was involved. Folios 34-37.

A motion was made thereafter by counsel appearing specially for the Italian Ambassador to strike out the petition and traverse sought to be made by the libelants, together with the annexed affidavits. Folios 41-42.

This motion was denied by Judge Knox on grounds stated in a memorandum opinion of April 24, 1920, as follows:

> "Over the protest of the libellant I vacated the attachment and arrest originally issued herein. At the time of the hearing there was urged upon me as a reason for refusing to act as I did, the state of facts presented by the petition filed herein upon January 21, 1920. This petition formally presenting what was before me somewhat more informally I am asked to strike from the record.
>
> "My action in releasing the *Pesaro* from arrest is now under review, and I am unable to see why the reviewing authority should not be apprised of all the facts that appeared before me and which were considered in reaching my conclusion. Only by so doing, it seems to me, can the nature and extent of error, if any, be properly seen and corrected. The motion to strike out the petition is denied." Folio 45.

FIRST POINT.

THIS COURT HAS NOT JURISDICTION ON THIS APPEAL BECAUSE IT WAS IMPROPERLY TAKEN TO THIS COURT DIRECT. THE QUESTION OF THE JURISDICTION OF THE DISTRICT COURT *as a Federal Court* WAS NOT INVOLVED AND, HENCE, THE APPEAL SHOULD HAVE BEEN TAKEN TO THE CIRCUIT COURT OF APPEALS AS WAS DONE IN "THE CARLO POMA," No. 167 ON THE PRESENT CALENDAR OF THIS COURT.

The appellee has made a motion, returnable at the time of this argument, to dismiss the appeal or affirm the judgment below on the ground that the appeal was improperly taken directly to this Court, for the reason that a question of immunity is not a question of jurisdiction within the meaning of Section 238 of the Judicial Code.

The relevant portion of Section 238 of the Judicial Code under which this appeal was taken to this Court is as follows (italics ours):

> "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: *In any case in which the jurisdiction of the Court is in issue*, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision; * * *"

It has always been held under that section of the Judicial Code and similar earlier statutes that the ques-

tion of jurisdiction, which has to be involved to enable an appeal to be taken to this Court direct from the District Court, is a question of the jurisdiction of the District Court *as a Federal Court.*

There have been decisions to this effect in this Court almost every year since the Circuit Courts of Appeals were established. From *Carey* v. *Houston, T. & C. Ry. Co.*, 150 U. S. 170 (1893) to *Farrugia* v. *Philadelphia & Reading Ry. Co.*, 233 U. S. 352 (1914) such decisions are numerous. The latest we believe to be *De Rees* v. *Costaguta*, decided December 6, 1920, and not yet officially reported.

A question of immunity is not a question of the jurisdiction of the Federal Court *as a Federal Court*, but is either a question of the general jurisdiction and authority of the Court as a judicial tribunal—a kind of question not appealable direct to this Court—

Bien v. *Robinson*, 208 U. S. 423 (1908).
Scully v. *Bird*, 209 U. S. 481 (1908).

or else it is a question of liability—

Workman v. *The Mayor*, 179 U. S. 570, 572, 574 (1900).
The Attualita, 238 Fed. 909, 911 (1916).

which would make it appealable at least in Admiralty cases, to the Circuit Courts of Appeal only.

The case of *The Attualita*, 238 Fed. 909, is the only case, so far as we are aware, in which this precise question has been adjudicated. In that case the question of

the immunity of an Italian privately owned vessel, requisitioned by the Italian Government, came up in the United States District Court for the Eastern District of Virginia, and from an order releasing the vessel on the ground of immunity, appeal was taken to the United States Circuit Court of Appeals for the Fourth Circuit.

Objection was there taken on the part of the appellees that the appeal should have been taken direct to this Court on the ground that the question was a question of jurisdiction.

The Court of Appeals for the Fourth Circuit held that the appeal was properly taken to that Court and said, 238 Fed. at page 911 (Italics ours):

> "The steamship says that the question involved is one of jurisdiction. The appeal should therefore have been taken to the Supreme Court. The objection which prevailed in the Court below was not to the jurisdiction of the District Court of the United States as a Federal Court, but was an objection *which went equally to the jurisdiction of any Court, State or Federal*, and for that reason the appeal to this Court was properly taken."

The situation in the *Pesaro* case now before the Court is simply this:

There is not any doubt whatever that a Court of Admiralty of the United States has jurisdiction of a libel *in rem* for damage to cargo.

If the District Court had really been dealing with question of a jurisdiction, which it thought it did not have, the proper procedure would have been for it to dismiss the libel for want of jurisdiction.

That was not done here.

Here the order merely vacates the arrest and releases the *Pesaro*, declaring her immune so long as she remains under the ownership and possession of the Kingdom of Italy.

As a matter of fact, therefore, the District Court, in this case, retained jurisdiction of the case, and released the vessel because, owing to the doctrine of immunity, it could not hold her liable in a case of which the subject matter was notoriously within its jurisdiction.

The only question involved here, was and is, whether, owing to the fact that the vessel was owned by and in possession of a foreign sovereign, a Court of Admiralty could hold the vessel liable *in rem* for cargo damage.

Such a question does not involve a question of jurisdiction of the Court below as a Federal Court any more than the question of the existence of a maritime lien does.

> Cf. *The Resolute*, 168 U. S. 437, 442, and cases there cited.

It is submitted, therefore, that this appeal was improperly taken direct to this Court and that the motion to dismiss should be granted or the order appealed from affirmed.

SECOND POINT.

THE STEAMSHIP "PESARO" WAS AND IS IMMUNE FROM THE PROCESS OF OUR COURTS AND THE FACT OF HER IMMUNITY WAS PROPERLY PRESENTED TO THE COURT BELOW.

I. *The special appearance of the Italian Ambassador, through proctors, for the purpose of claiming immunity and for no other purpose was a proper procedure for him to follow in the vindication of his Sovereign's prerogatives when a vessel owned by that sovereign was arrested by process of our Courts.*

The practice followed here does not differ from the ordinary admiralty practice except that the appearance was special only to claim immunity instead of being general with intention to dispute the merits of the libel.

When a vessel is arrested *in rem* in an ordinary suit between private litigants, an appearance, which is called a claim, is made by the owner himself, or by the owner acting through an agent, or by the master as lawful bailee of the vessel representing its owner.

The ordinary claim, after reciting the ownership of the vessel and that the owner, or his agent is the lawful bailee thereof, ends with the expression "Wherefore he [or they] pray to defend accordingly."

In the present case, of course, the Italian Government was asserting immunity and the special appearance and suggestion of the Italian Ambassador, representing the owner of the vessel, the Kingdom of Italy, instead of asking for leave to defend as in ordinary

cases, has the following prayer: "Wherefore it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from the process of this Court." Fol. 11.

Annexed to the special appearance and suggestion was a certificate by the Secretary of State to the effect that the Italian Ambassador, whose name was subscribed to the suggestion,

> "is duly accredited to this Government as Envoy Extraordinary and Minister Plenipotentiary of Italy." Fol. 10.

The regularity of this procedure for intervention is perfectly clear from the remarks of Mr. Justice Story in the case of *The Anne*, 3 Wheat, 435, 445.

In that case an appeal was taken to this Court from the District of Maryland under the following circumstances:

The British ship *Anne* was captured by a privateer while lying at anchor off the Spanish part of the Island of Santo Domingo in March, 1815, and carried into New York for adjudication as prize. The ship was then removed to Maryland under the provision of an Act of Congress, and Prize Proceedings instituted against her there.

A claim was interposed by the Spanish Consul for restitution of the vessel on the ground that it had been captured within Spanish territorial waters and, hence, in violation of Spain's neutrality.

Both the District Court and the Circuit Court ordered the condemnation of the vessel.

In affirming the decisions below, Mr. Justice Story dealt with the question of the intervention of the Spanish Consul and outlined the method by which diplomatic representatives of foreign States could intervene in our Courts. He said, at page 445 (Italics ours):

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish Consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion that this office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; *but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives.* There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof, of any such delegation of special authority in this case, and, therefore, we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed. *It is admitted, that a claim by a public minister, or in his absence, by a chargé d'affaires in behalf of his sovereign, would be good.* But in making this admission, it is not to

> be understood that it can be made in a court of justice without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserves their opinion, until the point shall come directly in judgment."

So far as counsel has been able to determine, there has not been any case in this Court since the case of *The Anne*, 3 Wheat, 435, where the question of the appearance of an Ambassador or Minister or Chargé d'affaires, on behalf of his sovereign in our Courts has come up. There have, however, been many cases in the lower Federal Courts where such intervention has been allowed and the immunity of the vessels in question sustained.

There is no question but that our Courts are open to suit by a friendly foreign sovereign as a plaintiff.

French Republic v. *Inland Navigation Co.*, 263 Fed. 410.
The Sapphire, 11 Wall. 174.
The King of Prussia v. *Keupper*, 22 Mo. 550.
Beers v. *Arkansas*, 20 How. 527.
Nicoll v. *U. S.*, 74 U. S. 122.
The Siren, 74 U. S. 152.

On the other hand, a friendly foreign sovereign cannot be sued in our Courts and its property is not subject to the process of our Courts.

Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341.
The Exchange, 7 Cranch. 116.

Hassard v. *United States of Mexico*, 29 Misc. 511; affirmed 173 N. Y. 645.

Even an enemy alien is entitled to defend if suit is brought against his property *in rem* or jurisdiction is secured over him *in personam*.

Watts, Watts, etc. v. *Unione Austriaca, etc.*, 248 U. S. 9.
McVeagh v. *United States*, 11 Wall. 259, 269.
Windsor v. *McVeagh*, 93 U. S. 274.
Hovey v. *Elliott*, 167 U. S. 409.
The Kaiser Wilhelm II, 246 Fed. 786.

As this is the settled law, how can it be contended with propriety that a friendly Foreign Sovereign has not *a right*, through his duly accredited Ambassador, to go into our Courts and appear specially to claim his own property and ask for the immunity which under international law is due to him and to it?

In the statement from *The Anne*, 3 Wheat. 435, 445, above quoted, Mr. Justice Story recognizes this right and the suggestion is made that the appearance in our Courts should not be without the assent or sanction of our Government. *It is noteworthy that he does not say appearance has to be made through our Executive Departments.*

This precise question, apparently, has never been presented to the Court, but it is here confidently contended that express assent is not necessary because the Courts are open to a foreign sovereign and it would be in derogation of his dignity to have to go to an executive or administrative official of our Government to get *permission* to defend his property.

It is submitted that an appearance by counsel, who is a member in good standing of the bar of the Court, on instructions by an Ambassador is a proper method to be followed in making such an intervention and that *the rule really is that a friendly Foreign Sovereign can always appear in our Courts* without challenge unless our Executive intervenes to object in the Court in which the appearance is sought, in which case, of course, it would be for the Court to decide whether the appearance should be allowed or not.

In the present case, however, the assent of the State Department has been secured because the Ambassador presented to the State Department his special appearance which contained the reasons for his intervention and a statement of the relief sought, and the State Department annexed to his special appearance a certificate of his standing as accredited Ambassador.

In the case of *United States* v. *Benner*, Baldw. 234, a motion in arrest of judgment, after defendant had been convicted of the crime of arresting and imprisoning one Louis Brandis, a minister of the King of Denmark, was overruled.

Mr. Justice Baldwin, in charging the jury, said:

> "By the constitution of the United States, the power of receiving ambassadors and other public ministers, is vested in the president of the United States; this power is plenary and supreme, with which no other department of the government can interfere, and when exercised by the president, carries with it all the sanction which the constitution can give to an act done by its authority. In

the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States, attach to the diplomatic character.

"The evidence of the reception of Mr. Brandis in this character, is the certificate from the secretary of the state which has been read. By the law organizing the department of state, it is the special duty of this officer, to perform all such duties as shall be entrusted to him by the president, to conduct the business of the department in such manner as he shall order and instruct, also to take an oath for the faithful performance of his duties. He is denominated in the law, 'the Secretary of foreign affairs'; his appropriated duties are, correspondence and communication with foreign ministers under the orders of the president; he has the custody of all the papers and archives of the department in relation to the concerns of the United States with foreign nations. Whatever act then is done by the department must be taken to be done by the orders or instructions of the president; the certificate of the secretary under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. The president acts in that department through the secretary, the one directs, the other performs the duties assigned; the law makes that department with all its officers, the agent of the executive branch of the government, so that a certificate under its seal by the secretary is full evidence, that what has been done by the department has been done by it in that capacity. If the law imposed on that department any duties upon subjects over which the president had no control, or none ex-

clusive of the other branches of the government, a certificate from its chief officer would not be evidence that it was done by the president; but as it can act on no subject unless under his orders, its acts must be taken to be his, especially as to the reception of ministers, as to which congress has no power to enjoin any duties on the department, or its officers.

"You will therefore consider Mr. Brandis as having been recognized by the president in the character of an attache to the legation of Denmark in the United States; and that such recognition is, per se, an authorization and reception of him within the meaning of the act of congress for we cannot presume, that the president would recognize a minister without receiving him. In the case of *U. S.* v. *Liddle* [case No. 15598] it was held by this court, that a certificate from the secretary of state, that a charge d'affaires of Spain had introduced a person to the president as an attache and secretary to that legation, was evidence of his reception as such. *U. S.* v. *Liddle* [*supra*]; U. S. *v.* Ortega [case No. 15,971]. Such recognition invests him with the immunities of a minister, in whatever form it may be done, and no court or jury can require any other evidence of a reception; we instruct you then as a matter of law, that at the times of the alleged arrest Mr. Brandis was a minister of Denmark in the character stated in the certificate."

To the same effect are the opinions of Mr. Justice Washington in *United States* v. *Liddle*, 2 Wash. C. C. 205, and *United States* v. *Ortega*, 4 Wash. C. C. 531.

The State Department certificate given in this case is, it is submitted, an *express assent* and sanction by the State Department to the Ambassador's intervention, if any such be needed. If it is not deemed an express assent, at least it necessarily *imports assent* and follows the strictest construction of the practice in these cases which can be spelled out of Mr. Justice Story's dictum in *The Anne*.

The State Department has not opposed in Court the use of this document with its certificate annexed.

It is clear, therefore, that by every principle of international law and under all the authorities *an Ambassador has a right, representing his sovereign, to vindicate that sovereign's prerogatives in our Courts*, and that in the present instance the course followed by the Italian Ambassador was strictly regular in every respect.

II. *If the Ambassador's appearance be considered an appearance as amicus curiae it was in all respects proper for the Court to allow it, for each Court has an inherent right in the exercise of its judicial discretion to allow appearances before it of amici curiae.*

The inherent right and power of a Court to permit intervention by an *amicus curiae* and to decide to what extent it will hear him and give him credence has been established by long usage.

This right is a part of a Court's essential nature as a tribunal which seeks from whatever proper source such information may be procurable, the information necessary to assist it in administering the law.

This right has perhaps been nowhere more pointedly expounded than by Judge Hough *arguendo* during the trial of the case of *The Texas Company* vs. *Hogarth Shipping Co., Ltd.*, as owner of the British steamship *Baron Ogilvy*, which is No. 555 on the present calendar of this Court, and is to be argued directly after the instant case.

In that case counsel for the British Embassy were allowed to intervene as *amici curiae* to file a suggestion and a certificate of the British Ambassador that the requisitioning of the steamship *Baron Ogilvy* under the circumstances stated in the certificate was a governmental act of the British Government.

The libelant's counsel objected to the intervention and the following colloquy took place:

> "The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?
>
> Mr. Poor: Well, it seems to us that it seriously——
>
> The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.
>
> Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government of-

ficial it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to directly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is——

The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a Court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him." *Texas Co.* v. *Hogarth*, No. 555, Folios 96-99.

In the case of *Northern Securities Co.* v. *United States*, 191 U. S. 555 (1903), a motion for leave to file a brief as *amici curiae* was denied to counsel not connected with the case for reasons in no way apt here, but the Chief Justice said, at pages 555, 556:

"Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green* v. *Biddle*, 8 Wheat. 1, 17; *Florida* v. *Georgia*, 17 How. 478, 491; *The Gray Jacket*, 5 Wall. 370."

In *The Employers Liability Cases*, 207 U. S. 463, at 490, the Court, after refusing a direct intervention by the Department of Justice, permitted the United States to appear and be heard as *amici curiae*.

This Court has permitted intervention by counsel to the British Embassy as *amici curiae* in the following recent cases:

Dillon vs. *Strathearn Steamship Co.*, 248 U. S. 182.

Strathearn Steamship Co. vs. *Dillon*, 251 U. S. 348.

Ex Parte Muir (*The Glenedeu*) No. 28, Oct. Term, 1918, argued January 7, 1919, still awaiting decision.

Texas Company v. *Hogarth*, No. 555 on the present calendar—to be argued with this case.

In the Circuit Courts of Appeal similar intervention as *amici curiae* by counsel representing Ambassadors, have been filed in the following cases:

Second Circuit—

The Claveresk, 264 Fed. Rep. 276.

The Carlo Powa, 259 Fed. Rep. 369.
Muir v. *Chatfield*, 255 Fed. Rep. 24.
Third Circuit—
The Adriatic, 258 Fed. Rep. 902.
Fifth Circuit—
The Strathearn, 256 Fed. Rep. 631.

Similar interventions have been allowed in several of the District Courts:

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.).
The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.).
The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.).
The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.).
The Rascric, 254 Fed. Rep. 154 (D. of N. J.).
The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.).
The Santa Cruz, (not reported, E. D. Va., June 28, 1919).

New York State Courts have also allowed similar intervention:

Nankivel vs. *Omsk All Russian Government*, New York Law Journal Oct. 28, 1920, not elsewhere reported.
Marine Transport Service Co. v. *Romanoff*, New York Law Journal, February 1, 1918, not elsewhere reported.

The English Admiralty Court in the case of the frigate *Constitution* allowed an even more informal intervention on behalf of the American Ambassador to Great

Britain than was made here in behalf of the Italian Embassy.

The Constitution, L. R. 4 P. D. 39.

So in *The Crimdon*, 35 Times Law Reports 81, intervention was allowed in the British Admiralty Court on filing of letters from a United States Shipping Board representative in England stating that the United States Shipping Board Emergency Fleet Corporation was a governmental agency, that it had the *Crimdon*, a Swedish vessel, under charter, and that she had been assigned to the United States Army Transport Service.

In the case of *The Roseric*, 254 Fed. 154, where a suggestion was filed by counsel for the British Embassy claiming immunity, Judge Rellstab of the District Court of New Jersey, in dealing with the question of such a suggestion, said 254 Fed. at page 163:

> "As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official

representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as *amicus curiae*—for a foreign government—Judge Thompson said he 'was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.'

"In the *Florence H, supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

"There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H*, I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary,

from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified."

In the case of *The Maipo*, 252 Fed. 627, Judge Mayer said, at page 628, in dealing with the suggestion and certificate by the Chilean Charge d'Affaires:

"While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the court, as here, by the duly accredited official of the foreign government.

"In response to an inquiry from proctors from the libelant and also for another shipper or consignee, our Department of State through the Third Assistant Secretary, has replied 'that the department has no intention of interfering with the legal proceedings to which you refer.' I cannot assume that this communication is intended to have any significance. It means, as I read it, nothing more than that the question is one for the courts to dispose of in due course. Doubtless the Chilean government has not deemed it necessary to bring the matter to the attention of the Department of

> State, but is willing, without further ado, that the points involved shall be passed upon by the court in orderly procedure without suggestion from our own government."

It would seem on principle apparently recognized by these authorities that a Court is at liberty in the exercise of *judicial discretion* to choose its own friends and to give to the information which they may communicate to it such weight as the Court considers the communications are entitled to receive.

Inasmuch as the purpose of the intervention is always stated to the Court when the intervention as *amicus curiae* is sought, the Court can in the exercise of its judicial discretion if it feels that the intervention is inadvisable refuse, on the threshold, to admit the intervention. Thus it is easily possible to prevent any embarrassment which might thereafter occur if the Court did not wish to give recognition to the statement which the *amicus curiae* purposes making.

The underlying error in the appellant's brief in dealing with the question of Ambassadorial intervention seems to be, that it fails to recognize the inherent right and power in a Court to choose its own friends, and also to realize that the necessary control which a Court has over the situation in every case will enable a Court to protect itself by refusing intervention whenever it thinks, in the exercise of a proper judicial discretion, wise to do so.

There have been recent instances where intervention by Ambassadors as *amici curiae* has been sought and denied.

In the case of *The Isle of Mull*, reported in 257 Fed. 798, Judge Rose, in the District Court of Maryland, refused to allow an intervention sought by the British Embassy similar to that allowed by Judge Hough in the case of *The Texas Company* v. *Hogarth Shipping Co., Ltd.*

In neither of those cases was immunity claimed. The suggestion merely was that the requisition was a governmental act. Judge Rose stated that before permitting intervention in such cases he would await an authoritative decision by a higher Court.

In the case of *The Appalachee*, 266 Fed. 923, Judge Smith, in the District Court for the Eastern District of South Carolina, also for reasons substantially the same as Judge Rose gave, refused to allow an intervention by the British Embassy claiming immunity.

The fact that these interventions were attempted does not appear in either of the opinions, but counsel for the appellants in this case represented the ship in both those cases and has full knowledge of the situation. The fact of the refusal of the intervention in those two cases is confirmed by the statements in the brief of counsel for the British Embassy filed by leave of this Court in the case of *The Texas Company* v. *Hogarth Shipping Company, Ltd.*, No. 555.

It is submitted that these refusals to permit ambassadorial intervention were erroneous. They involved an improper exercise of judicial discretion, and constituted appealable error for the reasons stated.

The Ambassador may instruct consular officers to intervene in various classes of litigation.

The intervention of consular officers in cases of suits by seamen before the present Seamen's Act came into force was a commonplace of procedure in such cases, and often led the Courts to refuse jurisdiction.

The Ester, 190 Fed. 216 and cases there cited.

Unreported cases where consular protests have been sustained in counsel's own experience are *Kicklakis* v. *The Hermia* in the Southern District of New York, and *Norsman* v. *The Overland* in the District of New Jersey.

Cf. *The Belgenland,* 114 U. S. 355, 364, 365.
Thompson v. *Rocca,* 223 U. S. 317.

In any event, it is not for private litigants to make objection to an ambassadorial intervention, whatever its form may be, or to assign error, if intervention is allowed. Objection can only properly be made by the Court itself or by our own Executive on proper diplomatic representation to the Ambassador who seeks to make the intervention or through him to his Government.

It is clear, therefore, that on principle and by well established precedent in our Courts, the District Court was right in allowing the intervention and suggestion of the Italian Ambassador in the present case.

Indeed, it is difficult to see how the ownership of a vessel by a Foreign Government or a foreign governmental act of any kind could be established in any feasibly prompt manner except by the statement in Court of the duly accredited representative of the Government in question.

And it would be a strict and hard doctrine to hold that the accredited Ambassador of a friendly for-

eign nation should be denied access to our Courts to protect his country's vessels, rights and nationals unless he first secured permission from our State Department!

Foreign Ambassadors are not Ambassadors to the State Department but to the United States. The State Department accepts their credentials and then they are free to act in any matters according to diplomatic usage.

It is true that most communications which they may wish to make are of a diplomatic nature and are made to the Executive through the State Department.

But as Judge Hough points out the Judiciary is an independent branch of our government.

So why should not an Ambassador communicate to our Courts regarding matters which in his opinion involve his sovereign's rights or interests, whether it be as to vessels or other property, or as to his country's nationals, provided always that his communications take such form as may be satisfactory to our Courts?

The appellants contend that the suggestion should have come through the State Department.

The only cases in which the State Department has transmitted, through the Department of Justice, to the attention of a Federal Court during the recent war any information received from an Embassy was in the cases of *The Luigi*, 230 Fed. 493 and *The Attualita*, 238 Fed. 909. A certified copy of the record in *The Attualita* in the Circuit Court of Appeals for the Fourth Circuit is herewith submitted.

The suggestion, which was the same in form as in *The Luigi*, was there filed by the United States Attorney for the Eastern District of Virginia, as will be seen by an

examination of the record of that case at page 8, did not certify to the truth of the statement of the Italian Embassy and did not even make a prayer for immunity, but merely submitted the fact that the vessel was requisitioned by and in the service of the Italian Government for such consideration as the Court might deem necessary and proper.*

It is difficult to see how such a procedure differs in any essential way from the procedure followed here, where the Secretary of State has certified to the fact that the Italian Ambassador, who makes the suggestion, is the duly accredited Ambassador from the Kingdom of Italy to Washington.

The procedure in *The Attualita* and *The Luigi* was merely a round-about way of doing something which was as conventionally and properly done in a direct way in this case.

The Italian Embassy had to appear by counsel as *amici curiae* in both *The Attualita* and *The Luigi.*

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* The suggestion in the *Attualita* was as follows:

I, Richard H. Mann, United States Attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States a communication dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian Steamship *Attualita* which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian Government; and was at the time of said attachment and is now in the service of the Italian Government; and I am further directed to call the attention of this Court in this connection of *The Luigi*, 230 Federal Reporter 493.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian Government, but I present the suggestion as *amicus curiae*, as a matter of comity between the United States Government and the Italian Government, for such consideration as the Court may deem necessary and proper.

RICHARD H. MANN,
United States Attorney.

By HIRAM E. SMITH,
Asst't United States Attorney.

III. *The suggestion of the Italian Ambassador conclusively establishes the fact that the ownership and possession of the steamship "Pesaro" was in the Italian Government and precluded any further judicial inquiry regarding such ownership or possession.*

The reason for this rule, which is thoroughly established, is that to submit to a judicial investigation of the facts stated in the suggestion would be to submit to the jurisdiction of the Court and it is well settled that a foreign sovereign or Government can not be made subject *in invitum* to the jurisdiction of our Courts.

In the case of *The Parlement Belge*, L. R. 5, P. D. 197, in which the English Court of Appeal held that an unarmed packet belonging to the King of the Belgians was immune from process in spite of the fact that the vessel carried merchandise for freight and passengers for hire, Lord Justice Brett said in dealing with the conclusiveness of the representations, at page 219 (Italics ours):

> "* * * the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. *To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into.* That was expressly decided under very trying circumstances in the case of *The Exchange*. *Whether the ship is a public ship used for national purposes seems to come within the same rule.*"

In Hall on International Law (4th Ed.) Sec. 44, page 167, it is said (Italics ours):

> "Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law. [Ortolan, Dip. de la Mer, i. 181-6; Calvo, §876-84.] The character of a vessel professing to be public is usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by competent authority within the state itself. [The Santissima Trinidad, vii Wheaton, 335-7; Ortolan, Dip. de la Mer. i. 181; Phillimore, i § ccexlviii.] *A fortiori attestation made by the government itself is a bar to all further enquiry.*"

In a foot note to this section, in dealing with the word of honour of a Commander, the author says:

> "The admission of the word of the commander is sometimes regarded as obligatory. When the *Sumter* was allowed to enter the port of Curacao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that 'le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par ecrit.' Ortolan, Dip. de la Mer, i. 183."

In a foot note dealing with an attestation made by a government, and citing *The Parlement Belge*, the author says:

> "This (i.e. attestation by a government) is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term."

This section from Hall was quoted with approval by Mr. Justice Brown in the case of *Tucker* v. *Alexandroff*, 183 U. S. 424, at page 441.

The conclusiveness of such suggestions has been recognized and the rule laid down in Judge Knox's memorandum has been approved in many leading cases in this country. Examples are:

The Exchange, 7 Cranch. 116.
The Maipo, 252 Fed. 627.
The Adriatic, 253 Fed. 489.
The Roseric, 254 Fed. 154.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363; affirming 253 Fed. 152.

The Adriatic, 258 Fed. 902.

The Carlo Poma, 259 Fed. 369.

The Claveresk, 264 Fed. 276, 280.

Texas Company v. *Hogarth*, 267 Fed. 1023, affirming 265 Fed. 375.

To the same effect are also many English cases:

The Constitution, L. R. 4, P. D. 39.

The Crimdon, 35 T. L. R. 81.

In the Goods of Anne Dumoy, 3 Hagg. Eccl. 767.

In the Goods of Klingemann, 3 Swab. & T. R. 18.

In the Goods of Prince Oldenberg, L. R. 9 P. D. 235.

At page 34 of the appellants' brief they make the statement that in the case of *The Attualita*, 238 Fed. 909, evidence was taken in respect of the relation of the Italian Government to the *Attualita*, in spite of the fact that a suggestion had been filed by the United States Attorney.

Counsel for the appellee in the present case was counsel for the libelant in the *Attualita* case and has knowledge of all the proceedings had therein.

The explanation of the fact that testimony was taken was that counsel for the libelant, while he admitted that he could not challenge the truth of the statements contained in the suggestion, demurred to them on the ground that inasmuch as they did not state either ownership or

possession in the Italian Government, they did not state sufficient reasons for claiming that the *Attualita* was a public ship or immune for any other reason.

In the case of *The Santissima Trinidad*, 7 Wheaton 283, Mr. Justice Story, held conclusive the proof of ownership of a vessel by a foreign sovereign, where the Commission of her captain was introduced in evidence. He said at pp. 335-336—

> "It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general, the commission of a public ship signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in

public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns."

To the same effect is *The Exchange*, 7 Cranch. 116, where Chief Justice Marshall said, at page 147:

"The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, *The Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a *right to assert his title in [*147] those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, *The Exchange* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the Amer-

> ican territory, under an implied promise, that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.
>
> If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

The procedure of Ambassadorial intervention and proof of facts without oath and without any cross-examination is therefore seen to be thoroughly settled in our law. The basis of the doctrine has been the subject of some speculation.

One theory of the credence given to suggestions and certificates of foreign diplomatic officers which should perhaps be here called to the Court's attention, is that inasmuch as the fact of ownership and possession of the vessel has been submitted by the Ambassador in proper form to the Court, the Court is entitled to take judicial notice thereof.

Cf. *Talbot* v. *Seeman*, 1 Cranch. 1, 38.

In Jones *vs.* United States, 137 U. S. 202, Judge Gray said at page 216:

> "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley Eq. Ev. pt. 3, c. 1; *Fremont* v. *United States*, 17 How. 542, 557; *Brown* v. *Piper*, 91 U. S. 37, 42; *State* v. *Wag-*

ner, 61 *Maine*, 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. *Spring* v. *Eve*, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19-21; *Gardner* v. *Collector*, 6 Wall. 413; *South Ottawa* v. *Perkins*, 94 U. S. 260, 267-269, 277; *Post* v. *Supervisors*, 105 U. S. 667. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State. *Taylor* v. *Barclay*, above quoted; *The Charkieh*, L. R. 4 Ad. & Ec. 59, 74, 86; *Ex parte Hitz*, 111 U. S. 766; *In re Baiz*, 135 U. S. 403."

It might be remarked in this connection that inquiry is often made by our Courts of the Department of State as to the recognition of a foreign Government and of the diplomatic character of its representatives and the replies made by the State Department are considered as conclusive on the Courts.

American Banana Co. v. *United Fruit Co.*, 160 Fed. 184, at 187; 166 Fed. 261, 265; affirmed 213 U. S. 247

Jones v. *United States*, 147 Fed. 202, 205, 206

In re Baiz, 135 U. S. 403, 425, 427

Ex parte Hitz, 111 U. S. 766, 767

Another theory is that this procedure is an exception to the general rules of evidence and that the ownership and possession of the vessel are facts which have been presented to the Court from a source deemed sufficient by the Court to warrant attributing such weight to the

suggestion as to render it conclusive proof of the facts therein stated.

Another theory is that inasmuch as the Italian Government is a Government recognized by the United States and the seal of its Embassy has been annexed to the Special Appearance and Suggestion of the Ambassador and our State Department has certified to the Suggestion under the seal of the State Department, the document proves itself, under or under analogy to the principle that Courts of the United States take judicial notice of Foreign Nations and their seals of State.

Schoerken v. Swift & Courtney & Beecher Co., 7 Fed. 469, 471
Lincoln v. Battell, 6 Wend. (N. Y.) 475, 481
Cf. also: *Robinson v. Gilman*, 20 Maine 290
Watson v. Walker, 23 N. H. 471
Phillips v. Lyons, 1 Texas 592

A third theory is that of Mr. Wigmore who concedes the admissibility of such an ambassadorial certificate, and classes it as an exception to the Hearsay Rule, under the heading of "Sundry Official Certificates."

Wigmore on Evidence, Vol. III. Sec. 1674, note on page 2089.

The basis of Mr. Wigmore's theory is somewhat obscure. In fact none of the theories advanced seem to cover the situation satisfactorily. This may be so because common-law rules of evidence are unconsciously invoked in an international law situation.

Perhaps the true explanation of the admission of Ambassadorial certificates as conclusive proof of the facts therein stated is, that it is a part of the law of evidence of *International Law*, that proof of facts of a governmental nature is allowed to be made by a person who by reason of his peculiar status does not have to make oath, (*Hall on International Law* (4th Ed.), Section 53, pages 190 and 191; and *The United States* v. *Wagner*, L. R. 2 Chancery Appeals 583), and cannot be cross-examined, or otherwise impeached in a court which, without his consent, has not jurisdiction over him.

The Parlement Belge, L. R. 5 P. D. 197
The Exchange, 7 Cranch 116, 147
The Adriatic, 258 Fed. 902; affirming 253 Fed. 489
The Roseric, 254 Fed. 154
Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363; affirming 253 Fed. 152
The Carlo Poma, 259 Fed. 369
Tucker v. *Alexandroff*, 183 U. S. 424, 441

Something, perhaps, remains to be said here concerning the contention made in the appellant's brief as to the kind of question involved in the Ambassador's suggestion in this case.

The appellant seems to claim, in the second part of his brief, that the Ambassador's suggestion must necessarily be considered either to raise a political or a judicial question; that if it raises a political question it should come through the State Department, and if it raises a judicial question, it may be controverted.

The answer to this contention is that there are a great many facts which cannot properly be called political facts, and at the same time are not justiciable facts.

The facts to which we refer may properly be called diplomatic facts or governmental facts or foreign administrative facts.

As is above shown, there is no jurisdiction over foreign sovereigns in our Courts under our Constitution.

This Court has under Article 3, Section 2, of the Constitution, original jurisdiction "in all cases affecting Ambassadors, other public ministers and consuls" only.

The result is that there are a large number of facts concerning foreign nations that are not justiciable in our Courts because there is no jurisdiction given over them by the Constitution.

It has been held that the decision of questions of a political nature is exclusively for the Executive and Congress.

The Divina Pastora, 4 Wheat. 52.

The decision of the Executive branch of the Government in respect of such matters is conclusive on the Judicial Department.

Williams v. *Suffolk Ins. Co.*, 13 Pet. 415.

Examples of Political Questions are:
Recognition of States or Nations,

Jones v. *U. S.*, 137 U. S. 202.
U. S. v. *Lynde*, 11 Wall. 632.
Kennett v. *Chambers*, 14 How. 38.

Gelston v. *Hoyt*, 3 Wheat. 246.
Rose v. *Himely*, 4 Cranch. 241.
The Nueva Anna, 6 Wheat. 52.
U. S. v. *Palmer*, 3 Wheat 610.

Accession and conquest of territory.

Hornsby v. *U. S.*, 10 Wall. 224.

Military occupation of subjugated territory.

Neely v. *Henkel*, 180 U. S. 109.

Foreign relations and policy.

The Nereide, 9 Cranch. 388.

Claims *v.* foreign government.

Comegys v. *Vasse*, 1 Pet. 193.

Policing of international waters.

Re Cooper, 143 U. S. 472.

Adjustment of political boundaries.

Foster v. *Neilson*, 2 Pet. 253.
Garcia v. *Lee*, 12 Pet. 511.
U. S. v. *Arredondo*, 6 Pet. 691.

Relations with the indian tribes.

Cherokee Nation v. *Georgia*, 5 Pet. 1.
U. S. v. *Holliday*, 3 Wall. 407.

Cession of territory by state to nation.

Burton v. *Williams*, 3 Wheat. 529.

Adoption and validity of constitutions.

Luther v. *Borden*, 7 How. 1.

Political and civil rights of persons.

Georgia v. *Stanton*, 6 Wall. 50.

Examples of non-justiciable governmental facts are: The title of foreign government owned vessels, such as is involved in this case and *The Carlo Poma*.

That a certain act was a governmental act of a foreign Government.

The Adriatic, 253 Fed. 489.
The Claveresk, 264 Fed. 276, 280.
Cf. *Texas Co.* v. *Hogarth*, 265 Fed. 375, aff'd 267 Fed. 1023.

Proof as to the status of a governmental commission.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363, 368.

Doubtless other instances could be added but the above will suffice to indicate the nature of non-justiciable governmental facts.

The fact to which the Ambassador certified in his suggestion was the ownership by the Italian Government and the possession in the Italian Government of the steamship *Pesaro*, and since he has so certified the question is not justiciable in our Courts because it is a fact not concerning an Ambassador but a fact concerning a foreign sovereign and a foreign sovereign does not have to submit himself to the jurisdiction.

IV. *Inasmuch as the "Pesaro" was conclusively shown at the time of the issuance of process to be owned by and in the possession of the Italian Government, she was entitled to immunity under well settled principles of international law.*

The reason for this is stated in the case of *The Exchange*, 7 Cranch 116, by Chief Justice Marshall, which is the leading case on the subject, at page 136:

> "The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. * * * One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. * * * Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be con-

> sidered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise."

In the case of *The Parlement Belge,* L. R. 5, P. D. 197, Lord Justice Brett, after quoting the authorities, stated the principle as follows, at page 214:

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

A very recent well considered English case which followed and applied the decision of *The Parlement Belge,* (1880), L. R. 5 P. D. 197, is the case of *The Porto Alexandre,* (1920) Probate 30, in the English Court of Appeal.

The *Porto Alexandre* was formerly a German owned ship named *Ingbert,* which, by a decree of the Portuguese Prize Court, on January 30, 1917, was adjudged a lawful prize of war. She had been previously requisitioned by the Portuguese Government and handed over to the Commission for Service of Transports Maritime and was

being employed in ordinary trade voyages earning freight for the Government. On September 13, 1919, she got aground in the River Mersey and salvage services were rendered to her by three Liverpool tugs.

On September 16th, a writ *in rem* on behalf of the owners, masters and crews of these tugs was issued against the *Porto Alexandre*, her cargo and freight.

Mr. Justice Hill, following *The Parlement Belge*, ruled that the steamship was immune and the plaintiffs appealed.

By unanimous decision of the Court of Appeal, the decision below was affirmed.

Lord Justice Scrutton's opinion is especially illuminating. On page 36, he said (Italics ours):

> "Now this State and other states proceed in their jurisprudence on the assumption that sovereign states are equal and independent, and that as a matter of international courtesy no one sovereign independent state will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign state; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that states do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent states and their sovereigns. I think it has been well settled first of all as to the sovereign that there are not limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making

promises of marriage and breaking them, the English Courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this Court. That is the well-known case of *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. 149. It has been held, as Mr. Dunlop admits, in *The Parlement Belge*, 5 P. D. 197, that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis C. J. in *Taylor* v. *Best* (1854) 14 C. B. 487, 519, said: '. . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 22 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our Court, by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in the cases of trading applying only to the servants of the embassy.' There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property

of the state there is a limitation, and that—as I understand him—if the property is used in trading that cannot be for the public service of the state. That is not the way in which he expressed it, but it appears to me to be the proposition which emerges from his argument.

"We are concluded in this Court by the decision in *The Parlement Belge*, 5 P. D. 197, 217. Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the court of Appeal in *The Parlement Belge*, overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the Court. Brett, L. J. said: 'As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use.' One of the reasons given seems to me conclusive: the moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the 7th edition of Hall's International Law at p. 211, where, after dealing with warships and public vessels, so called, Mr. Hall goes on to deal with other vessels employed

in the public service and property possessed by the state within foreign jurisdiction, and says: 'If in a question with respect to property coming before the Courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state.'

"I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. *The Parlement Belge* excludes remedies in these Courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. *These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states.* While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must, in this Court, stand

by the decision already given, and the appeal must be dismissed.'"*

Another practical aspect of the matter is well dealt with by Judge Mayer in the case of *The Maipo*, 252 Fed. 627, where he says at page 631:

> "While diplomatic questions are beyond the Court's province, yet practical considerations of comity are not to be lost sight of. The exigencies and requirements of this extraordinary war may

* Other English cases in which immunity has been granted are as follows:
To war vessels:
The Constitution, L. R. 4 P. D. 39;
The Prins Frederik, 2 Dod. 451.
To a sovereign:
Mighell v. *Sultan of Johore*, (1894) 1 Q. B. 149;
Duke of Brunswick v. *King of Hanover*, 2 H. L. Cas. 1.
To public vessels owned by Foreign Sovereigns although not war vessels:
The Jassy, (1906) Probate 270;
The Gagara, (1919) Probate 95.
To a Canadian ferryboat owned by the Canadian Government:
Young v. *Scotia*, (1903) App. Cas. 501.
To vessels owned, requisitioned or chartered by Governments:
The Broadmayne, (1916) Probate 64;
The Messicano, 32 T. L. R. 519;
The Errissos, Lloyd's List, Oct. 24, 1917;
The Crimdon, 35 T. L. R. 81.
To property or funds of Foreign Sovereigns:
Vavasseur v. *Krupp*, L. R. 9, Ch. D. 351;
De Haber v. *Queen of Portugal*, 17 Ad. & El. (N. S.) 175, 204;
Wadsworth v. *Queen of Spain*, 17 Ad. & El. (N. S.) 171, 215.
Our Courts, in addition to *The Exchange*, 7 Cranch. 116, where immunity was extended to a French war vessel under very trying circumstances have extended it—
To vessels owned by Foreign Governments and in possession of naval officers:
The Pampa, 245 Fed. 137;
The Maipo, 252 Fed. 627.
To lightships:
Briggs v. *The Light Ships*, 11 Allen, Mass. 157.
To municipal tugs:
The Fidelity, 9 Ben. 333; 16 Blatch. 569.
To privately owned vessels under requisition to the British Government and classed by it as admiralty transports:
The Roserie, 254 Fed. 154.
To a Foreign Government:
Hassard v. *United States of Mexico*, 29 Misc. 511; affirmed 173 N. Y. 645.
To funds of a Foreign Government owned Railway:
Mason v. *Intercolonial Railway*, 197 Mass. 349.

well lead (and possibly already has led) our government to man otherwise commercial ships with American naval officers and men, to the end that our ships may be protected while our needs in various directions may be supplied in foreign ports. These enterprises may, in some instances, be regarded (technically speaking) as commercial, but may, in substance, be of benefit to the people at large. Time is of vital importance to every ship, of whatever nationality, which sails the seas. To be detained by process at this time may cause damage not capable of money measurement. Indeed, it would not be surprising if at no distant date large numbers of vessels setting out from various ports of various countries would be manned as government vessels for the very purpose of assuring quick clearance and freedom from process. Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country."

The fact that actual possession was not in the sovereign is the explanation of the decisions in

The Johnson Lighterage Co. No. 24, 231 Fed. 365 (involving the salvage of Russian munitions).

Long v. *The Tampico*, 16 Fed. 491 (involving claims for salvage of Mexican revenue cutters which had just been built but had not been placed in Mexican public service and in respect of which the claim of immunity was

not made by a properly authorized Mexican Government agent).

That neither ownership nor possession was in the sovereign explains the decisions in:

The Attualita, 238 Fed. 909 (a privately owned requisitioned Italian vessel not rated as a transport).

The Florence H., 248 Fed. 1012 (a United States cargo vessel in possession of the United States Shipping Board Emergency Fleet Corporation, a private company).

The difference, as usually stated, between our law and the English law in regard to immunity, is thus put by Judge Ward, in the case of *The Carlo Poma*, 259 Fed. 369. He there says at page 370:

"The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge*, Law Reports, 5 P. D. 197; *The Jassy* (1906), P. 270.

The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Long* v. *The Tampico* (D. C.) 16 Fed. 491; *The Attualita*, 238 Fed. 909, 152 C. C. A. 43."

The tendency of our law, we think, can fairly be stated to be towards the English doctrine as is instanced by the case of *The Roseric*, 254 Fed. 154, in which, although technical possession was not in the British Government, the immunity asked for was granted on the ground that the vessel was in Government service.

This decision seems much more consonant with modern conditions than the narrower rule of *The Davis*, which was adopted, it must always be remembered in respect of our own Government whose rights and claims against which are justiciable in our courts.

Indeed when ownership is in a Foreign Sovereign it is doubtful whether possession would or should be material, if the Sovereign intervenes in the proper way to claim immunity for his property.

There is not any case in our reports where a vessel *owned* by a Foreign Sovereign has been held except *Long* v. *The Tampico*, 16 Fed. 491, and in that case immunity was claimed for the vessels by a private person who was unable to show his authority. The case is, therefore not a precedent for holding a foreign government owned vessel when proper claim of immunity is made. Indeed Judge Addison Brown implies that if the vessels had gone into the public service of Mexico immunity would have been granted.

In *The Tampico* it was found as a further ground for disallowing immunity that the vessel had not yet gone into the public service of Mexico. Hence it is not contrary to Judge Rellstab's decision in *The Roseric*, 254 Fed. 154.

In the present case both ownership and possession were in the Italian Government and, consequently, all the requirements for immunity under the strictest American decisions have been met.

It is contended in pages 20 to 27 of the brief for the appellant that Section 9 of the original Shipping Act of 1916, providing that merchant vessels owned by the United States when used solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, which was re-enacted by the Merchant Marine Act of 1920, approved June 5, 1920, indicates that our Government for its own vessels in its own Courts has adopted the principle that if the vessels are employed as merchant vessels they should not be immune from suit.

It is curious, however, that the Merchant Marine Act, 1920, while it does repeal and amend certain previous Acts, has not any general provisions for repealing of all Acts inconsistent therewith, and, consequently, the Suits in Admiralty Act, approved March 9, 1920, is still in force. In that Act, by Section 1* suits *in rem* against merchant vessels owned and operated by the United States and by corporations, the whole of whose capital stock is owned by the United States, are rendered immune from process *in rem* in our Courts.

*Section 1 of the Suits in Admiralty Act reads as follows:

That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

The Suits in Admiralty Act then provides for suits *in personam* against the United States in respect of such causes of action as might have been brought against the vessels and details the procedure. In Section 7, procedure in the event of arrest of vessels in foreign Courts is covered.*

Section 7 is entitled in the margin "*Vessels and cargo immune from suit in foreign countries,*" and provides for the claiming of immunity of United States owned vessels, for the giving of bonds in the event that immunity is waived, or that the immunity claimed is over-

*Section 7 of the Suits in Admiralty Act is as follows:

"That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States Consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulater as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: PROVIDED, HOWEVER, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

ruled, and contains the express provision "that nothing in this section shall be held to prejudice or preclude a claim of immunity on such vessel or cargo from foreign jurisdiction in a proper case."

It is difficult to conceive how the appellant can properly found an argument that the United States should, on account of these statutes, hold a vessel owned by a foreign sovereign to process in our Courts if the foreign sovereign chooses to assert the immunity which is his.

It is perfectly clear that the re-enactment of Section 9 of the Shipping Act of 1916, in the Merchant Marine Act of 1920, was merely a declaration of policy as to allowing suits in our own Courts in respect of admiralty claims against United States owned vessels used for carrying cargo, and that by the Suits in Admiralty Act of March 9, 1920, the procedure to be followed in such claims against the United States was set forth.

The Suits in Admiralty Act is a really remedial or practice act, and in so far as it deals with the question of immunity, sustains it in every respect because it gives immunity to United States vessels in our own Courts and reserves the right to claim immunity in foreign Courts.

That the United States is as particular as any monarchical government ever was in the maintenance of its sovereignty and in resisting any act in derogation of its sovereign rights is shown in a very interesting way in the argument of Mr. Caleb Cushing in the case of *The Sapphire*, 11 Wall. 164, as it is quoted in the Lawyers

Co-operative Edition of the United States Supreme Court Reports, Vol. 20, pages 127 to 128.

In that case Mr. Cushing stated that he had been counsel for the United States in English Courts in a number of cases and that there was no question but that a foreign sovereign could commence proceedings in the Courts of a friendly nation and that to refuse him this right would, perhaps, be a *casus belli*.

In arguing for the right of a foreign sovereign to appear in our Courts, Mr. Cushing, speaking of a case in which he had been of counsel for the United States in the English Courts in which the question of the style under which the sovereign should sue and the practice of discovery in suits by a sovereign arose, said:

> "Next, the English lawyers and judges boggled on the question how to obtain discovery from a plaintiff Republic.
>
> "This question was made in the case of *The U. S. v. Wagner*, L. R. 2 Ch. App. 583.
>
> "Vice Chancellor Wood opined that the President of the United States must act for or be joined with the United States.
>
> "We, the United States replied: The President cannot lawfully and, therefore, will not and shall not appear as plaintiff, or make discovery on oath, for or with the United States; and so the case went to the Court of Appeals in chancery.
>
> "That court, consisting of the Chancellor, Lord Chelmsford, and the Lords Justices, Sir George James Turner and Lord Cairns, agreed that the President could not be compelled to appear and so overruled the Vice-Chancellor.
>
> "But thereupon, said the Vice Chancellor, some Corporeal person must appear to disclose

on oath, the Attorney General or the Secretary of State. We replied: no, neither they nor anybody else. The United States will make disclosure under its great seal, duly certified by its lawful keeper, the Secretary of State, and in no other form or manner; and if you do not rest content with this, say so, and we will make it a case of insulted national dignity and honour, quite as full of political meaning as the Alabama. And so we filed our answer under the great seal."

Perhaps it is worth considering that the practical results of following the well-settled law and declaring the immunity of vessels owned by foreign governments does not mean that we shall be faced for years to come with having vessels which are immune from the process of our Courts come into our ports.

While the law is now settled that such vessels are immune, the situation may clear itself in the manner suggested by Lord Justice Scrutton in the quotation above made from his opinion in *The Porto Alexandre*, 1920 Probate 30, by persons refusing to deal with foreign government owned vessels if claims of immunity persist.

The situation may, of course, be cured by negotiations between the Governments who own the vessels and the making of mutual agreements as to waiver of immunity for vessels used commercially.

If the first process should be considered too slow and the second process should not be feasible because other Governments would not agree to submit vessels which they own, although used commercially, to the process of our Courts, there is a third method of dealing with the situation.

The United States can pass any laws it wishes prescribing the terms on which foreign vessels shall use our ports.

Mr. Justice Brewer said in the case of *Patterson* v. *The Bark Eudora*, 190 U. S. 169, at page 178:

> "The implied consent of this Government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such permission and conditions as the Government sees fit to impose."
>
> Cf. *The Exchange*, 7 Cranch. 116, 149.

If the commercial use of immune vessels by Foreign Governments becomes a serious menace to our ships and citizens, it would be possible and proper, it is submitted, for Congress to pass an act providing that any Foreign Government owned vessels entering our ports for commercial purposes would be deemed in all respects to have the status of privately owned vessels and be subject to all the liabilities of privately owned vessels.

Such a declaration of policy would be notice to the world of a change of status of such Foreign Government owned vessels within our jurisdiction. And after the passage of such an act immunity could not be claimed because such vessels would be deemed to have waived immunity by coming into our ports.

But until such legislation is passed the well-settled rules of international law prevail, because, as Chief Jus-

tice Marshall said in *The Exchange*, 7 Cranch. 116, the case which is the commencement of all the jurisprudence on this subject, at page 147 (Italics ours):

> "It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.
>
> Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,* which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, *ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.*"

The appellants further claim that the extent of the immunity which should be allowed be regulated by the nature of the case.

The difficulty with this argument is that this case involves a Foreign Sovereign; and that Foreign Sovereign, far from consenting to waive his immunity, is very strongly urging it.

Until, therefore, by appropriate action of Congress, the United States shall have given notice to the world of a change in our policy towards Foreign Government owned vessels, there exists a kind of international estoppel against holding such vessels under the process of our Courts.

Until the rules are changed by the proper authority, it is submitted, our Courts must play the game in accordance with the rules.

THIRD POINT.

THE ATTEMPT ON THE PART OF THE APPELLANTS TO PROVE ITALIAN LAW IS IMPROPER AND THAT PORTION OF THEIR BRIEF SHOULD BE STRICKEN OUT.

The appellants have attempted to establish the law of Italy with regard to immunity by arguing the question at pages 30 and 31 of their brief and appending to their brief an opinion of an alleged Italian Advocate.

It is and has been from earliest times well settled that foreign law must be proved as a fact.

Armstrong v. *Lear*, 8 Peters 52.
Church v. *Hubbart*, 2 Cranch. 187.
Talbot v. *Seeman*, 1 Cranch. 1.
Liverpool & Great Western Steam Co. v. *Phoenix Ins. Co.*, 129 U. S. 397.

It really is absurd for the appellants to be contending that the certificate of a duly accredited foreign minister is not evidence as to the status of the *Pesaro* as a public

vessel because they have not an opportunity of cross-examining the Ambassador, when, at the same time, they are endeavoring to prove Italian law by a letter from an alleged Italian Advocate without any opportunity on the part of the appellees to examine the Advocate on the matters set forth in his letter.

By both their contentions they are running counter to well settled legal principles.

The part of the brief dealing with the question of the Italian Advocate's opinion, together with the appendix containing the opinion, should be stricken from the files of the Court.

FOURTH POINT.

AS THE "PESARO" WAS RELEASED WITHOUT BOND IT IS A GRAVE QUESTION WHETHER THERE IS ANY REAL QUESTION TO ADJUDICATE.

Another interesting question arises in connection with the motion to dismiss, namely, as to the status of a procedure of this kind *in rem* when the *res* has been discharged without the giving of any bond or security.

It seems that under such circumstances, the case has become a *moot case* because it is of the essence of a proceeding *in rem* that there should be *a res*, or its equivalent before the Court.

The Fidelity v. *United States*, 1 Sawyer, 153; Fed. Cas. 4755.

The Alliance, 70 Fed. 273, 275 (1905), decided by the C. C. A. for the 9th Circuit, Mr. Justice McKenna, who was then Circuit Judge, presiding.

Waples on "*Proceedings in Rem*," page 54.

Works on "*Courts and their Jurisdiction*," page 54.

Here the *Pesaro* has been released and no bond filed or undertaking to give a bond substituted for her, as was done in the matter of *Muir as Master of the Gleneeden* v. *Chatfield* now before this Court.

It is doubtful, therefore, whether this Court will deem itself forced to consider the other more interesting questions hereinabove discussed.

LAST POINT.

THE ORDER OF THE DISTRICT COURT APPEALED FROM WAS CORRECT AND, UNLESS THE APPEAL IS DISMISSED ON THE PRACTICE QUESTION RAISED IN THE FIRST POINT, THE DECISION BELOW SHOULD BE IN ALL RESPECTS AFFIRMED AND THE IMMUNITY OF THE STEAMSHIP PESARO DECLARED BY THIS COURT.

Respectfully submitted,

JOHN M. WOOLSEY,
Of Counsel.

January 15, 1921.

SUPREME COURT OF THE UNITED STATES.

No. 317.—October Term, 1920.

The Pesaro. | Appeal from the District Court of the United States for the Southern District of New York.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

The *Pesaro*, an Italian steamship which carried a shipment of olive oil from Genoa to New York, was sued *in rem* in admiralty in the District Court to enforce a claim for damage to that part of her cargo, the libel alleging that she was "a general ship engaged in the common carriage of merchandise by water, for hire." The usual process issued and the ship was arrested. Afterwards, upon a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession, and therefore was not subject to the court's process, the court vacated the arrest. The libelants objected that a direct suggestion by the Ambassador was not admissible and that, to be entertained, the suggestion should come through official channels of the United States; but the objection was overruled. The libelants then requested permission to traverse the suggestion and to make a showing in opposition; but the request was denied, the court holding that to controvert or question the suggestion was not allowable. The libelants appealed directly to this court and in that connection the District Court certified the ground of its decisions as follows:

"I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a Court of Admiralty, has no jurisdiction to subject to its process a steamship, which is by the suggestion of the said Italian Ambassador filed in this Court represented to be the public property and in the possession of the Kingdom of Italy."

Our authority to entertain the appeal is challenged upon two grounds. One is that the decree is not final, because it does not dismiss the libel. That it does not formally do so is true, but this is not decisive. The suit is *in rem*—is against the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as if it formally dismissed the libel. Obviously, therefore, it is final. That it was intended to be so is shown by the court's certificate.

The other ground is that the question raised and decided was not a jurisdictional one in the sense of the statute, Jud. Code, § 238, providing for an appeal or writ of error from a District Court directly to this court "in any case in which the jurisdiction of the court may be in issue." But we think it was such a question, because it directly concerned the power of the District Court, as defined by the laws of the United States, to entertain and determine the suit. *The Steamship Jefferson*, 215 U. S. 130, 137-138; *The Ira M. Hedges*, 218 U. S. 264, 270; *United States* v. *Congress Construction Co.*, 222 U. S. 199. By the Judicial Code, § 24, cl. 3, the District Courts are invested with original jurisdiction of "all civil causes of admiralty and maritime jurisdiction"; and this is a suit of that character. Whether Congress intended this statute should include suits against ships such as the *Pesaro* is represented to be in the Ambassador's suggestion, when they are within the waters of the United States, is as yet an open question. The statute contains no express exception of them; but it may be that they are impliedly excepted. *The Exchange*, 7 Cranch 116, 136, 146. If so, the implication is a part of the statute. *United States* v. *Babbit*, 1 Black 55, 61; *South Carolina* v. *United States*, 199 U. S. 437, 451. Thus, the answer to the question propounded to the District Court involved a construction of the statute defining its jurisdiction in admiralty.

We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction. On the contrary, what was said in the libel pointed plainly to its presence. The suggestion was made directly to the court and not through any official channel of the

United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a "suggestion" and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. *In re Muir*, Master of *The Gleneden*, *ante*, p. —. And see *United States* v. *Lee*, 106 U. S. 196, 209. With the suggestion eliminated, as it should have been, there obviously was no basis for holding that the ship was not subject to the court's process. What the decree should have been if the matters affirmed in the suggestion had been brought to the court's attention and established in an appropriate way we have no occasion to consider now. An opportunity so to present and establish them should be accorded when the case goes back, as it must.

Decree reversed.

A true copy.

Test:

Clerk Supreme Court, U. S.